BOSTON PUBLIC LIBRARY

BOSTON PUBLIC LIBRARY

PUBLIC LIBRARY

WAR POWERS, LIBYA, AND STATE-SPONSORED TERRORISM

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ARMS CONTROL, INTERNATIONAL SECURITY AND SCIENCE

OF THE

COMMITTEE ON FOREIGN AFFAIRS

HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

APRIL 29, MAY 1 AND 15, 1986

Printed for the use of the Committee on Foreign Affairs

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1986

KF27
F636
1986X

sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

LEE H. HAMI
GUS YATRON
STEPHEN J. S
DON BONKER
GERRY
DAN M
MICHA
HOWA
GEO. W
SAM G
MERVY
TOM L.
PETER
ROBER
LAWRI
HOWA
HARR
MEL L
EDWA
TED W
GARY
BUDD
MORR
ROBE

HOW
MOR
LEE
STE
GER
MIC
TOM

1KF27 F636/1986X 876013898 UNITED STATES CHAR POWERS LIBRARY AND STATE-S
SECTION AUTHOR BRIEF TITLE TRACK NUMBER

DO NOT REMOVE THIS
CARD FROM THE BOOK POCKET

A FINE OF 10 CENTS WILL BE
CHARGED FOR LOSS OF THIS CARD.

BOSTON PUBLIC LIBRARY

PCS-10370

CONTENTS

WITNESSES

Page

Tuesday, April 29, 1986:
- Hon. Abraham D. Sofaer, legal adviser, Department of State 5
- Hon. J. Brian Atwood, director, National Democratic Institute 61

Thursday, May 1, 1986:
- Professor Archibald Cox, chairman, Common Cause 103
- W. Taylor Reveley III, managing partner, Hunton & Williams 125

Thursday, May 15, 1986:
- Hon. Matthew F. McHugh, a Representative in Congress from the State of New York 164
- Hon. Joe Barton, a Representative in Congress from the State of Texas 187
- Hon. Duncan Hunter, a Representative in Congress from the State of California 197

MATERIAL SUBMITTED FOR THE RECORD

Summary of April 29, 1986 hearing: State-Sponsored Terrorism and Compliance with the War Powers Resolution, prepared by Raymond J. Celada, senior specialist in American public law, American Law Division, Congressional Research Service, Library of Congress 94

Summary of May 1, 1986 hearing: State-Sponsored Terrorism and Compliance with the War Powers Resolution, prepared by Raymond J. Celada, senior specialist in American public law, American Law Division, Congressional Research Service, Library of Congress 153

APPENDIXES

1. Letter from Chairman Fascell to President Reagan concerning deployment of American naval forces off the coast of Libya (March 24, 1986) and response thereto (March 26, 1986) 207
2. Chronology of events relating to the April 14, 1986 raid on Libya 210
3. Transcript of address by President Reagan on Libya (April 14, 1986) 214
4. List of Members of Congress invited to April 14, 1986 White House briefing 215
5. Text of S.J. Res. 340, to amend the War Powers Resolution to establish a permanent body for the purposes of consultation as required in section 3 under the resolution 216
6. Text of H.R. 4611, to protect U.S. citizens from terrorism 218
7. Anti-Terrorism Act of 1986 (S. 2335 and H.R. 4611): A summary prepared by Ellen C. Collier, specialist in U.S. Foreign Policy, Foreign Affairs and National Defense Division, Congressional Research Service, Library of Congress 223
8. Questions submitted by Chairman Fascell to Abraham Sofaer [1] 230
9. Questions submitted by Chairman Fascell to Archibald Cox and responses thereto 241
10. Naval Exercises in the Gulf of Sidra and the War Powers Resolution: A summary prepared by Raymond J. Celada, senior specialist in American public law, American Law Division, Congressional Research Service, Library of Congress 252
11. U.S. Action Against Libya in the Gulf of Sidra: War Powers Issues: A summary prepared by Ellen C. Collier, specialist in U.S. foreign policy, Foreign Affairs and National Defense Division, Congressional Research Service, Library of Congress 265

[1] Responses not received.

Page

12. Letter from Members of Congress to Chairman Fascell (April 28, 1986) enclosing copy of April 11 telegram to President Reagan 279
13. Statement submitted by Hon. John F. Seiberling, a Representative in Congress from the State of Ohio 283
14. Statement submitted by Hon. Robert L. Livingston, a Representative in Congress from the State of Louisiana 293
15. Statement submitted by William Green Miller 294
16. Letter to Chairman Fascell from the Friends Committee on National Legislation 327
17. Statement submitted by Leon Leighton 330
18. Statement submitted by the Coalition for a New Foreign and Military Policy 382

WAR POWERS, LIBYA, AND STATE-SPONSORED TERRORISM

TUESDAY, APRIL 29, 1986

House of Representatives,
Committee on Foreign Affairs,
Subcommittee on Arms Control,
International Security and Science,
Washington, DC.

The subcommittee met at 10:07 a.m., in room 2172, Rayburn House Office Building, Hon. Dante B. Fascell (chairman) presiding.

Chairman Fascell. The subcommittee will please come to order.

WAR POWERS COMPLIANCE AND U.S. ANTITERRORISM POLICY

We meet this morning to continue an ongoing series of hearings on the question of executive branch compliance with the War Powers Resolution. Our specific focus for this discussion has been brought about by the United States naval maneuvers in the Gulf of Sidra in late March, and the retaliatory bombing raid against Tripoli and other Libyan targets on April 14.

We will also deal with the critical, fundamental question of how to integrate executive branch compliance with the provisions of the War Powers Resolution with an effective strategy for dealing with state-sponsored terrorism.

So, we will see if we can add something in terms of improving the procedures for consultation under the resolution in cases of responses to terrorism.

Clearly, the President's actions against Libya have the strong support of the Congress and the American people. However, when we respond with military force to state-sponsored terrorism directed against the United States, should it not be consistent with our own laws and constitutional procedures? We have experienced difficulty defining the constitutional responsibilities of the Congress and the Chief Executive and ensuring compliance with the statutory requirement of the War Powers Resolution.

NEED TO NEGOTIATE ACCEPTABLE CONSULTATION PROCESS

Frankly, in all the years that we have been discussing this, in the final analysis, I recognize the fact that it is primarily a matter of negotiation as to what a satisfactory relationship is. Despite the best efforts of scholars and others, the Supreme Court is not going to decide this issue, and therefore it will continue to be, as it has been since the founding of the Nation, a matter of sensible accom-

modation. We do not want to violate the Constitution, nor do we want to violate the spirit or letter of the law—which must be upheld, whether we like it or not.

RESPONSIBILITY TO UPHOLD THE LAW

It does not say anywhere in the Constitution or in the statutes that you have to like an act of law in order to comply with it. As a matter of fact, the responsibility of the Chief Executive is to faithfully execute the laws of the land, and not to look for ways around compliance by stretching the facts or stretching definitions or other imaginative methods.

So, despite, for example, clearcut evidence that naval maneuvers in the Gulf of Sidra, at a minimum, involved imminent involvement in hostilities, we had no consultation with the Chief Executive. If you look at the history of the situation in the Gulf of Sidra and the question of freedom of navigation, you do not have to look too far to realize that based on those facts, any reasonable person would have concluded that there might be imminent hostilities, particularly when military personnel are prepared for combat.

HISTORY OF NONCOMPLIANCE

So there was no consultation, no report, and because of a dislike for the War Powers Resolution, which is still the law, we find Presidents, and not just this one, waltzing around in an attempt to avoid the requirements of the resolution. Now, that is not true in every case. It is only when it suits them. In other cases, they come to the Congress and in effect comply without saying they are complying.

NEED FOR EXECUTIVE FLEXIBILITY ACKNOWLEDGED

We know the President has to have flexibility. He must have the means to respond, with force when necessary, to state-sponsored terrorism, which is clearly a new type of warfare directed against the United States. And that raises constitutional questions, not just the statutory question of complying with the War Powers Resolution.

It says if you are going to introduce U.S. military personnel into areas where combat is imminent or is actually occurring, and Congress has the responsibility under the Constitution as the branch of Government which can take the country to war, is there not some constitutional responsibility there?

There may be a delicate balance between the question of giving the Executive flexibility and meeting constitutional requirements. But on the other hand, it would appear at the present moment, that what we are confronted with is not only the question of complying with the statutory requirements of the War Powers Resolution, which requires consultation with and reporting to the Congress, but also the question of whether or not there has not been a broad arrogation and interpretation of the constitutional prerogatives of the Chief Executive. In other words, can the President, as Commander in Chief, take the country to war wherever an act of state-sponsored terrorism has taken place, and do it all under the

rubric of saying that this is self-defense and every nation has the right to defend itself.

JUSTIFICATIONS FOR MILITARY ACTION

Of course, it is often claimed that such a response is designed to save American lives. So it is very easy to see how that delicate line can be broken, and we can get mired in confusion. We need to engage in a dialog. What has happened, if it is left undiscussed, unchallenged, is that we have entered into a new way of going to war that totally bypasses the Constitution, which says that only the Congress can take the country to war.

And that new theory is that since we have state-supported terrorism, and since they have declared war on us, we do not really have to declare war on them. The United States, under the Commander in Chief theory, and under the theory of self-defense, can attack, can use the military might of the United States against any country when an act of terrorism has occurred which is supported by that country.

Now, you may, and I may, want to support that action. But we have to examine the question as to whether or not we are at that point modifying the Constitution, in effect; and if so, what do we want to do about it? Just ignore it? Just leave it there? Are we going to seek a constitutional amendment?

LEGISLATION TO AMEND THE WAR POWERS RESOLUTION

One theory has been to rewrite the War Powers Resolution, and legislation has been introduced which affects the constitutional question in some fashion. That legislation amends the War Powers Resolution. It gives the President blanket authority to respond to terrorist acts without regard to existing laws. In other words, consultation with congress is seen as a hindrance to the President's ability to exercise his responsibility with regard to the self-defense of the country, or the protection of American lives.

So, it would appear that the proponents of expanding the power of the Chief Executive realize that they are raising a constitutional question, or they would not have filed legislation to change the War Powers Resolution.

We have some distinguished experts with us today, to discuss the issues I have raised in my opening statement. Before we receive their testimony, however, Mr. Broomfield, the ranking Republican, has something he would like to say.

GULF OF TONKIN RESOLUTION AND DECLARATIONS OF WAR

Mr. BROOMFIELD. Mr. Chairman, I want to compliment you on your statement. I think these hearings are very desirable. When the War Powers Resolution was drawn up, it was obviously a result of the situation in Vietnam, and I wonder if you would comment upon that.

Today, we are dealing with a totally different situation with acts of international terrorism, and I think there is a difference between the two situations.

Chairman FASCELL. Well, there is, Bill, obviously, a difference.

The primary issue with regard to Vietnam was the question of a declaration of war, and how you integrated the responsibility of the Congress with actions already taken by Chief Executives, plural. Now, what was done in that particular case was that the Congress in effect ratified an act of war by first providing the money in a $700 million supplemental appropriation bill, and then subsequently ratifying the act by what has been known, and still is, as the Gulf of Tonkin resolution.

Now, if you read the Gulf of Tonkin resolution, the Congress granted broad powers to the President to conduct military operations as if in a state of war, and gave him full authority that the Constitution envisions without use of the formal words, we, the Congress of the United States, do hereby declare war against country X.

So there is still a question as to whether or not the Gulf of Tonkin Resolution satisfies the constitutional requirement.

WAR POWERS AND EXCEPTIONS TO CONSTITUTIONAL REQUIREMENTS

The question that arises with respect to the War Powers Resolution is slightly different, however. The question here is the gray areas in which the President, for whatever reason, emergency, self-defense, or protection of American lives, decides to commit, as Commander in Chief, the armed services of the United States into a specific situation without a declaration of war. The question in such cases is, how do you satisfy the constitutional requirement?

We in the United States have been living under generally accepted exceptions to the constitutional requirement. Those exceptions are that Congress does not have to declare war; the President is acting constitutionally when as Commander in Chief he acts in self-defense of his military forces. Somebody shoots at them, they shoot back. It is an act of war, but it has been generally accepted that the Congress does not have to declare war.

So these are the type of gray areas that the War Powers Resolution sought to address. What it said was, Mr. President, if you are going to, under these generally recognized exceptions, commit the military might of the United States into hostilities, then the Congress must be brought into the act.

And it does not say in every case. It knows that in some cases the President has to act quickly and cannot consult with the Congress. But it certainly envisions more than mere notification. For example, "you will be happy to know, gentlemen, that a decision has been made, and the troops are on the way." It envisions more than that.

So it is these kinds of questions our legal experts will discuss with us today. We have with us the legal advisor of the Department of State, the Honorable Judge Abraham D. Sofaer.

Judge, if you would be kind enough to come to the table.

We have in Judge Sofaer not only the legal advisor for the Department of State, but an author and constitutional expert, somebody who long before he served the Government was interested in this whole question. I would not want him to reconcile his statements today with his past writing on war powers, especially if they are different, which I know they are.

But let me reserve judgment on that until I hear his testimony. Judge, we are delighted to have you here. It is nice to see you.

STATEMENT OF HON. ABRAHAM D. SOFAER, LEGAL ADVISER, DEPARTMENT OF STATE

Mr. SOFAER. Mr. Chairman, it is an honor to be here with you. I am pleased to have this opportunity to discuss the War Powers Resolution in the context of recent events.

I would like to begin with some general thoughts about the War Powers Resolution. With your permission, I will file a written statement, and then depart from my written statement and greatly compress it in order to permit the committee to ask me questions.

Chairman FASCELL. Without objection, your statement will be placed in the record in its entirety.

Please proceed.

Mr. SOFAER. Thank you.

The resolution, as you know, Mr. Chairman, better than anyone, was enacted in 1973 to ensure adequate congressional participation in these issues that are so crucial to the well-being of the United States. It contains certain requirements concerning consultation, reporting, and termination of the use of U.S. Armed Forces.

The consultation requirement in particular says that the President in every possible instance shall consult with Congress before introducing U.S. Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; and after each such introduction, to consult regularly. The resolution specifies only that consultation occur before introducing Armed Forces in the situation specified, as well as after each such introduction until the situation ends. It does not define the nature of the consultations required, but allows the President to determine precisely how such consultations are to be carried out.

In making the requirement applicable only where consultation is possible, moreover, the resolution expressly contemplates that consultation in a particular case will depend on the prevailing circumstances.

Over the years, Mr. Chairman, you know, both before and after the resolution, the executive branch has engaged extensively in consultations with the Congress in a variety of circumstances. We do seek and will continue to seek legislative views about our policies involving the use of military force.

In practice, the form and substance of consultations have depended upon the circumstances of each case. In some instances, such as the introduction of United States forces into Egypt to participate in a peacekeeping operation, or the case of the Vietnam evacuation, the situation permitted detailed consultations well in advance of the action contemplated. In the case of the Teheran rescue mission, prior consultation was not possible because of extraordinary operational needs.

Section 4 of the resolution deals with the reporting requirement, and it requires a report within 48 hours when a situation occurs that is covered by section 3. Both Republican and Democratic Presidents have provided written reports to the Congress with re-

spect to U.S. deployments abroad. Every President since the resolution's adoption has provided reports, and President Reagan has provided more reports than any prior President. Indeed, the executive branch has provided information to the Congress in many cases where no relevant statutory requirement exists.

Section 5 of the resolution provides that, within 60 days after a report is submitted or required to be submitted, the President must terminate the use of U.S. forces unless the Congress has declared war or specifically authorized the use of such forces, or extended the 60-day period. The section also provides that the President must remove U.S. forces from engagement in hostilities abroad if the Congress so directs by concurrent resolution. And you, I am sure that you and the other members of this committee, are familiar with the probable, unconstitutionality of the concurrent resolution provision.

We have differed from the Congress, Mr. Chairman, with respect to the constitutionality and wisdom of various aspects of the War Powers Resolution, particularly the deadlines relating to section 5. But I do not think that those deadlines are really at the heart of what we are talking about today. I will turn, rather, to the question that concerns the committee, and specifically to the recent cases that have arisen.

The resolution was enacted, to echo Congressman Broomfield's comments, in the shadow of United States involvement in the Vietnam war, and moreover in the shadow of the so-called Watergate scandals. In more recent years, however, issues have been raised under the resolution in situations that bear no resemblance to the Vietnam war, and in fact may not have been contemplated at the time of the resolution's adoption.

Indeed, if I may depart from my prepared remarks, Mr. Chairman, I would point out that in some of the preliminary suggestions as to the form which the War Powers Resolution should take, there were many legislative leaders, including Senator Javits and yourself, who contemplated that there were specific situations in which history and the Constitution anticipated that the President would be able to act unilaterally. The resolution avoided resolving the discussions about what those situations should be.

But all the drafts that I recall reading of the types of legislation that might have been passed in lieu of the War Powers Resolution seemed to contemplate that the defense of Americans abroad was one category in which the President was assumed to have fairly extensive authority to act unilaterally, subject, of course, to ultimate congressional control, and subject to any policy controls that Congress established either in advance or after an event.

It is a regrettable reality in the world that Americans abroad are increasingly subjected to murder, kidnapings, and other attacks by terrorists who seek to further their political ends through such means. The hijacking last year of TWA flight 847, with the murder of Navy diver Stethem, is a well-known recent example. In that case, we had no reason to believe that the Government of Lebanon had encouraged or otherwise supported the terrorists. It was simply unable to control them.

In such a situation, the President may decide to deploy specially trained antiterrorist units in an effort to secure the release of the

hostages or to capture the terrorists who perpetrated the act. Does the War Powers Resolution require consultation and reporting in this kind of situation?

We doubt that the resolution should in general be construed to apply to the deployment of such antiterrorist units where operations of a traditional military character are not contemplated, and where no confrontation is expected between our units and forces of another state. To be sure, the language of the resolution makes no explicit exception for activities of this kind. But such units can reasonably be distinguished from the resolution's language of "forces equipped for combat." And their actions against terrorists differ greatly from the "hostilities" expressly contemplated by the resolution.

Nothing in the legislative history of the resolution indicates, moreover, that the Congress intended the resolution to cover deployments of such antiterrorist units. These units are not conventional military forces. A rescue effort or an effort to capture or otherwise deal with terrorists where the forces of a foreign nation are not involved is not a typical military mission, and our antiterrorist forces are not equipped to conduct sustained combat with foreign armed forces.

Rather, these units operate in secrecy to carry out precise and limited tasks designed to liberate U.S. citizens from captivity, or to attack terrorist kidnapers and killers. When used, these units are not expected to confront the military forces of a foreign state.

In a real sense, therefore, action by an antiterrorist unit constitutes a use of force that is more analogous to law enforcement activity by police in the domestic context than it is to the hostilities between states contemplated by the War Powers Resolution.

I might note in this connection that other types of cases involving military deployments, such as the movement of warships in international waters or even through foreign territorial waters—the deployment of security personnel, and transits of combat aircraft, have been assumed not to be covered by the resolution.

Now, even assuming that the resolution were applicable to the movement and use of antiterrorist units in the situations that I have described, the fact is that consultations may not, and generally will not, be possible in such cases. The existence and purpose of these units is well known to the Congress. The need for swiftness and secrecy inherent in the nature of those activities is so extraordinary that consultations prior to deployment might well jeopardize the lives of our units and the hostages they may seek to liberate.

Issues under the War Powers Resolution have also been raised where U.S. forces have engaged in a military exercise in conformity with international law. This is the second type of situation I want to discuss today, Mr. Chairman.

The incident in the Gulf of Sidra in late March illustrates this situation. Does the resolution require the President to consult and report in this kind of case?

Some factual background is essential in connection with our naval exercises pursuant to our program of freedom of the seas. The United States is committed to the exercise and preservation of navigation and overflight rights and freedoms around the world.

That is the purpose of our freedom of navigation program. A deliberate decision was made during the Carter administration to discourage or negate unlawful claims to extended jurisdiction in the oceans.

During that period, Mr. Chairman, a proliferation of such claims being made by nations around the world, and President Carter and his national security adviser specifically addressed this matter and decided on that policy. The policy was reaffirmed in 1982 by President Reagan, and the essence of it is now public in a statement on U.S. oceans policy issued in 1983. That statement made clear that we would do three things, all explicitly set out by both President Carter and President Reagan, to ensure the continued freedom of the seas.

One, we would work with other nations to negotiate agreements whereby these freedoms would be assured. And we worked on the Law of the Seas Convention to advance that end.

Two, we would formally protest efforts by states to take away from the peoples of the world the right to use these international waters and airspaces.

And three, we would engage in a program of exercising international rights in those waters and airways, in order to help preserve those rights.

We have continually exercised our rights since then, Mr. Chairman, during the years between 1979 or thereabouts and the present. The exercise of our rights is a crucial part of this program. It provides visible and powerful evidence of our refusal to accept unlawful claims. The United States has protested and exercised rights in unrecognized historic water claims, territorial sea claims greater than 12 nautical miles, and territorial sea claims that impose impermissible restrictions.

We have exercised our rights against objectionable claims made by 35 countries, including the Soviet Union, at a rate of about 30 or 40 per year. We followed precisely this established policy in connection with Libya. When Qadhafi came to power in Libya, it was not long before private firms saw their private interests expropriated. Then, on October 9, 1973, Qadhafi broadened the scope of his interest in expropriating the rights of others and asserted his claim to the ownership of the Gulf of Sidra, and other claims as well, I might add, Mr. Chairman.

The United States vigorously and formally protested that assertion on February 11, 1974, and in the years since then we have exercised our rights in that area on numerous occasions.

The War Powers Resolution, we believe, was not intended to require consultation before conducting routine maneuvers in international waters or airspace in the context of this global freedom of navigation program. We are aware of no previous suggestion that the resolution would require consultation in such situations. This question was carefully considered in connection with the Sidra exercise in March, and the decision was made that the conduct of those operations did not place U.S. forces into hostilities or into a situation in which imminent involvement in hostilities was clearly indicated by the circumstances.

The United States has conducted its exercises not only in Sidra, but around the world, not only in March, but for years, and in

most instances without hostile response. We have, in fact, been in the Gulf of Sidra area 16 times since 1981, and we had crossed Qadhafi's so-called line of death seven times before the operation last March. Only once before did Qadhafi respond with military action, and in that instance he was singularly unsuccessful.

While we must always be aware of the risks and be prepared to deal with all contingencies, we have every right to expect that neither Libya nor any other country will take hostile action against United States forces while they are lawfully in and over areas of the high seas. The threat of a possible hostile response is not sufficient, in our judgment, to trigger the consultation requirement of section 3, which refers only to actual hostilities and to situations in which imminent involvement in hostilities is clearly indicated by the circumstances.

Where a peaceful operation does in fact result in hostile action to which U.S. forces must respond in immediate self-defense, such an isolated engagement should not normally be construed as constituting the introduction of U.S. Armed Forces into a situation of actual or imminent hostilities for the purpose of the reporting requirement of section 4. No report was submitted in the case of the 1981 Sidra incident, during which two Libyan aircraft were shot down after they fired at us.

Where, however, we have a situation in which our Armed Forces might withdraw from an area after we have been attacked, and then be reintroduced into the same area, we believe an argument could be made that the resolution would apply. We do not accept that argument as valid. However, as a matter of caution and because we, too, agree with your position, Mr. Chairman, that we should not be reading this resolution in a narrow, artificial way, but with a purpose of cooperating with the spirit of the resolution and with Congress in every way possible, we submitted a report to the Congress when such a situation arose in Sidra this year.

Let me turn to the third kind of situation, one which you spent quite a bit of time in your own remarks discussing, that is when U.S. forces take legitimate action in self-defense against facilities or forces of another state because of its sponsorship of terrorist acts against Americans. In the April 14 operation against Libya, United States forces undertook military action in self-defense against five terrorist-related targets in order to pre-empt and deter Libya's unlawful aggression through terrorist force against the United States and its nationals. Does the War Powers Resolution apply in such a situation?

Mr. Chairman, the use of U.S. forces to conduct a military strike against the facilities of a hostile, sovereign state in its own territory falls squarely within the specific terms of the consultation requirement of section 3 of the resolution. In this context, we would only say that flexibility is required.

As indicated earlier, section 3 expressly envisions the possibility that in some instances the President might have to act without prior consultation. In other instances, the President has to weigh the necessities of the operation in determining the manner in which consultation will take place, the form of consultation. In the case of the April 14 operation, extensive consultations occurred with congressional leaders. They were advised of the President's in-

tention after the operational deployments had commenced, but hours before military action actually occurred.

This satisfied the resolution's requirement that consultation occur before the introduction of troops into hostilities or a situation of imminent hostilities. Congressional leaders had ample opportunity to convey their views to the President before any irrevocable action was taken, but no one who was consulted objected to the actions undertaken. The President took a serious risk, in my judgment, in conducting these consultations. The press observed legislative leaders, including yourself, Mr. Chairman, entering the White House for these consultations. And speculation ensued internationally about possible military action.

The press also learned immediately after the consultations that the President was to make an address later that evening, and this led to rumors of imminent military action that could have jeopardized the success of the operation, the lives of our airmen.

The consultations in this case were consistent with the provisions of the War Powers Resolution. They were also consistent with, and in many respects exceeded in scope and depth, the consultations conducted on previous occasions, some examples of which I have given you in my written statement.

We also believe, of course, since section 3 is applicable in these situations, that section 4 is applicable as well. And, Mr. Chairman, you know that we filed within 48 hours of that action a report consistent with the War Powers Resolution.

In recent weeks, the question has been raised publicly as to the President's constitutional power to take military action without the express prior approval of Congress. This is a question that has been addressed by executive branch officials on many occasions over the years, and their statements are well known to you, Mr. Chairman, and to this committee. Without going into the specifics of those statements, it is clear that the limited actions undertaken by President Reagan in response to attacks on the United States and its citizens in the instances I have discussed today fall within the President's authority under the Constitution.

As noted earlier, the War Powers Resolution does not confer power on the President, but it clearly recognizes that the President has independent constitutional authority to take appropriate military action. It is also important to note in this regard that the President is not simply acting under his inherent constitutional authority when taking the types of actions we are discussing today. The Congress has, over the years, learned of, considered, and effectively endorsed in principle the use of U.S. forces for a variety of purposes through its adoption of laws and other actions.

Let me just mention, Mr. Chairman, section 1453 of the 1986 Department of Defense Authorization Act, which specifically states that it is the duty of the Government to safeguard the safety and security of U.S. citizens against a rapidly increasing terrorist threat, and that U.S. special operations forces provide the immediate and primary capability to respond to such terrorism. And the Congress has appropriated funds for the specific purpose of improving U.S. capabilities to carry out just such operations.

Likewise, the Congress has appropriated considerable funds to fund the naval operations that I referred to earlier, and Congress is

well aware of these operations, Mr. Chairman, the Freedom of the Seas Program. It has all been public and on the record. In this sense, Congress has participated in the creation and maintenance of the forces whose functions are to carry out the very types of operations that we are discussing here today. The President has openly discussed and explained the need for and propriety of these uses of force, and he has correctly assumed they are widely supported by Congress and by the American people. All of the actions undertaken were clearly signaled well in advance, and therefore pose no threat to the role of Congress under the Constitution in military and foreign affairs.

Mr. Chairman, as you have said so eloquently in the past, the types of actions we have taken differ greatly from the invasion of Cambodia, which was kept secret even from the chairmen of the respective committees on foreign affairs right up to the day in which it was undertaken. The action against Libya differs markedly in principle and fact from the kinds of actions that created the concern in Congress that were related to the Vietnam conflict.

It seems fair to say, in conclusion, that, while it is unclear exactly how the War Powers Resolution was originally intended to apply in situations such as the ones we are discussing today, in some of them the resolution should not be deemed to apply; in some, in special situations, it may apply, and we generally will make every effort to act in a manner consistent with it where a good argument could be made that it applies; and in some situations it clearly applies, and we in those situations seek to act consistently with it, as every President since the War Powers Resolution has stated, both in terms of consultation and in terms of reporting.

On a broader level, I just want to say, Mr. Chairman, from my own prior experience in this area, that these issues highlight some of the significant, negative aspects of the War Powers Resolution whose effects, in my judgment, on the Congress are perhaps even more profound than on the executive. The need that some Members of Congress feel to defend the resolution's viability even in situations well beyond those contemplated at the time of its adoption causes Congress to shift its concern, its deliberations, and its political leverage away from evaluating the merits of military actions to testing issues about legality and to focusing on formal and institutional questions rather than on the substance of our national policies.

Our history amply demonstrates that Congress has adequate means—indeed, overwhelming means—through the budgetary process and otherwise, to provide an effective check on Presidential power to employ military force, but the War Powers Resolution often unwisely diverts our leaders from issues of policy to issues of law.

I will be happy, Mr. Chairman, to respond to any questions you or other members of the committee may have.

[Mr. Sofaer's prepared statement follows:]

Mr. Chairman, Members of the Subcommittee:

I am pleased to have the opportunity to appear before you today to discuss the War Powers Resolution in the context of recent events. I would like to begin by setting out some general considerations regarding the Resolution, and then focus on the application of the Resolution to specific cases which are of particular interest to the Subcommittee.

Basic Framework

The War Powers Resolution was enacted in 1973 in order to ensure congressional involvement in situations in which

THE UNITED STATES MAY BECOME ENGAGED IN HOSTILITIES WITH OTHER STATES. TO THAT END, THE RESOLUTION CONTAINS CERTAIN REQUIREMENTS CONCERNING CONSULTATION, REPORTING, AND TERMINATION OF THE USE OF U.S. ARMED FORCES. OF COURSE, THIS AND OTHER ADMINISTRATIONS HAVE EXPRESSED SERIOUS DOUBTS ABOUT THE WISDOM AND CONSTITUTIONALITY OF VARIOUS PARTS OF THE RESOLUTION.

THE CONSULTATION REQUIREMENT IS CONTAINED IN SECTION 3, WHICH PROVIDES:

> "THE PRESIDENT IN EVERY POSSIBLE INSTANCE SHALL CONSULT WITH CONGRESS BEFORE INTRODUCING UNITED STATES ARMED FORCES INTO HOSTILITIES OR INTO SITUATIONS WHERE IMMINENT INVOLVEMENT IN HOSTILITIES IS CLEARLY INDICATED BY THE CIRCUMSTANCES, AND AFTER EVERY SUCH INTRODUCTION SHALL CONSULT REGULARLY WITH THE CONGRESS UNTIL UNITED STATES ARMED FORCES ARE NO LONGER ENGAGED IN HOSTILITIES OR HAVE BEEN REMOVED FROM SUCH SITUATIONS."

THE RESOLUTION SPECIFIES ONLY THAT CONSULTATION OCCUR "BEFORE INTRODUCING" ARMED FORCES IN THE SITUATIONS

SPECIFIED, AS WELL AS "AFTER" EACH SUCH INTRODUCTION UNTIL THE SITUATION ENDS. IT DOES NOT DEFINE THE NATURE OF THE CONSULTATIONS REQUIRED, BUT ALLOWS THE PRESIDENT TO DETERMINE PRECISELY HOW SUCH CONSULTATIONS ARE TO BE CARRIED OUT. SIGNIFICANTLY, IN MAKING THE REQUIREMENT APPLICABLE ONLY WHERE CONSULTATION IS "POSSIBLE," THE RESOLUTION EXPRESSLY CONTEMPLATES THAT CONSULTATION IN A PARTICULAR CASE WILL DEPEND ON THE PREVAILING CIRCUMSTANCES.

OVER THE YEARS, BOTH BEFORE AND AFTER THE RESOLUTION WAS ADOPTED, THE EXECUTIVE BRANCH HAS ENGAGED IN CONSULTATIONS WITH THE CONGRESS IN A VARIETY OF CIRCUMSTANCES INVOLVING THE POSSIBLE DEPLOYMENT OF U.S. FORCES ABROAD. CONSULTATIONS HAVE OCCURRED IN CASES WHERE THE RESOLUTION MIGHT HAVE BEEN THOUGHT TO REQUIRE THEM AND IN CASES WHERE IT CLEARLY WOULD NOT (AND THE EXECUTIVE BRANCH HAS TYPICALLY BEEN CAREFUL TO PRESERVE ITS POSITION ON THESE MATTERS WHEN CONSULTING). THE PURPOSE OF SUCH CONSULTATIONS IS TO KEEP THE CONGRESS INFORMED, TO DETERMINE WHETHER THE CONGRESS APPROVES OF A PARTICULAR ACTION OR POLICY, AND TO GIVE THE CONGRESS AN OPPORTUNITY TO PROVIDE THE PRESIDENT WITH ITS VIEWS, ESPECIALLY WHERE IT MAY DISAGREE WITH THE POLICY. CONSULTATIONS ARE NOT INTENDED TO INVOLVE THE CONGRESS IN REVIEWING THE DETAILED PLANS OF A MILITARY OPERATION. THE DEGREE TO WHICH THE PRESIDENT IS IMPLEMENTING A POLICY OF

WHICH THE CONGRESS IS WELL AWARE AND WHICH IT HAS ALREADY APPROVED IN PRINCIPLE IS ONE IMPORTANT FACTOR TO BE CONSIDERED IN DETERMINING THE NATURE AND TIMING OF CONSULTATIONS.

IN PRACTICE, THE FORM AND SUBSTANCE OF CONSULTATIONS HAVE DEPENDED UPON THE CIRCUMSTANCES OF EACH CASE. IN SOME INSTANCES, SUCH AS THE INTRODUCTION OF U.S. FORCES INTO EGYPT TO PARTICIPATE IN PEACEKEEPING OPERATIONS, OR THE CASE OF THE VIETNAM EVACUATION, THE SITUATION PERMITTED DETAILED CONSULTATIONS WELL IN ADVANCE OF THE ACTION CONTEMPLATED. IN THE CASE OF THE TEHRAN RESCUE MISSION, PRIOR CONSULTATION WAS NOT POSSIBLE BECAUSE OF EXTRAORDINARY OPERATIONAL NEEDS.

SECTION 4 OF THE RESOLUTION REQUIRES THAT THE PRESIDENT SUBMIT, WITHIN 48 HOURS AFTER THE INTRODUCTION OF U.S. FORCES, A WRITTEN REPORT TO THE CONGRESS IN THREE CIRCUMSTANCES. A REPORT MUST BE SUBMITTED WHEN U.S. FORCES ARE INTRODUCED "INTO HOSTILITIES OR INTO SITUATIONS WHERE IMMINENT INVOLVEMENT IN HOSTILITIES IS CLEARLY INDICATED BY THE CIRCUMSTANCES." IN ADDITION, A REPORT MUST BE SUBMITTED WHEN U.S. FORCES ARE INTRODUCED "INTO THE TERRITORY, AIRSPACE OR WATERS OF A FOREIGN NATION, WHILE EQUIPPED FOR COMBAT" (WITH CERTAIN SPECIFIED EXCEPTIONS), OR WHEN SUCH FORCES ARE INTRODUCED "IN NUMBERS WHICH SUBSTANTIALLY ENLARGE UNITED

States Armed Forces equipped for combat already located in a foreign nation ...."

Both Republican and Democratic Presidents have provided written reports to the Congress with respect to U.S. deployments abroad as a means of keeping the Congress informed, while reserving the Executive Branch's position on the technical applicability and constitutionality of the Resolution. Reports were submitted by President Ford in connection with the Indochina evacuations and the Mayaguez incident, and by President Carter in connection with the Tehran rescue mission. During the Reagan administration, reports were submitted with respect to U.S. participation in the Multinational Force and Observers in the Sinai and the Multinational Force in Lebanon, the deployment of U.S. aircraft in connection with the situation in Chad, and the introduction of U.S. forces into Grenada. More recently, a report was submitted concerning the encounter with Libyan forces during U.S. military exercises in and near the Gulf of Sidra in late March, and a report was submitted with respect to the April 14 operation against Libya. Indeed, the Executive Branch has provided information to the Congress in many cases where no relevant statutory requirement existed.

SECTION 5 OF THE RESOLUTION PROVIDES THAT WITHIN 60 DAYS AFTER A REPORT IS SUBMITTED OR REQUIRED TO BE SUBMITTED, THE PRESIDENT MUST TERMINATE THE USE OF U.S. FORCES UNLESS THE CONGRESS HAS DECLARED WAR OR SPECIFICALLY AUTHORIZED THE USE OF SUCH FORCES, HAS EXTENDED THE 60-DAY PERIOD OR IS PHYSICALLY UNABLE TO MEET AS A RESULT OF AN ARMED ATTACK ON THE UNITED STATES. THE SECTION ALSO PROVIDES THAT THE PRESIDENT MUST REMOVE U.S. FORCES FROM ENGAGEMENT IN HOSTILITIES ABROAD "IF THE CONGRESS SO DIRECTS BY CONCURRENT RESOLUTION." THE LEGISLATIVE VETO PROVISION OF THE RESOLUTION CANNOT STAND IN THE FACE OF THE SUPREME COURT'S 1983 DECISION IN INS V. CHADHA.

THE EXECUTIVE BRANCH HAS HISTORICALLY DIFFERED WITH THE CONGRESS OVER THE WISDOM AND CONSTITUTIONALITY OF THE 60-DAY PROVISION OF SECTION 5. AS PRESIDENT REAGAN MADE CLEAR IN SIGNING THE MULTINATIONAL FORCE IN LEBANON RESOLUTION ON OCTOBER 12, 1983, THE IMPOSITION OF SUCH ARBITRARY AND INFLEXIBLE DEADLINES CREATES UNWISE LIMITATIONS ON PRESIDENTIAL AUTHORITY TO DEPLOY U.S. FORCES IN THE INTERESTS OF U.S. NATIONAL SECURITY. SUCH DEADLINES CAN UNDERMINE FOREIGN POLICY JUDGMENTS, AND ADVERSELY AFFECT OUR ABILITY SAFELY AND EFFECTIVELY TO DEPLOY U.S. FORCES IN SUPPORT OF THOSE JUDGMENTS. MOREOVER, THE PRESIDENT'S CONSTITUTIONAL AUTHORITY CANNOT IN ANY EVENT BE IMPERMISSIBLY INFRINGED BY

STATUTE. SECTION 8(D) OF THE RESOLUTION ITSELF MAKES CLEAR THAT THE RESOLUTION WAS NOT INTENDED TO ALTER THE CONSTITUTIONAL AUTHORITY OF THE PRESIDENT. THE PRESIDENT HAS CONSTITUTIONAL POWER, AS COMMANDER-IN-CHIEF AND AS THE NATION'S PRINCIPAL AUTHORITY FOR THE CONDUCT OF FOREIGN AFFAIRS, TO DIRECT AND DEPLOY U.S. FORCES IN THE EXERCISE OF SELF-DEFENSE, INCLUDING THE PROTECTION OF AMERICAN CITIZENS FROM ATTACKS ABROAD. FROM THE TIME OF JEFFERSON TO THE PRESENT, PRESIDENTS HAVE EXERCISED THEIR AUTHORITY UNDER THE CONSTITUTION TO USE MILITARY FORCE TO PROTECT AMERICAN CITIZENS ABROAD.

I WOULD ALSO MENTION THAT SERIOUS CONSTITUTIONAL PROBLEMS EXIST WITH RESPECT TO SECTION 8(A) OF THE RESOLUTION, WHICH PURPORTS TO LIMIT THE MANNER IN WHICH THE CONGRESS MAY IN THE FUTURE AUTHORIZE THE USE OF U.S. FORCES. I DO NOT BELIEVE THAT ONE CONGRESS BY STATUTE CAN SO LIMIT THE CONSTITUTIONAL OPTIONS OF FUTURE CONGRESSES. NOR CAN CONGRESS CONTROL THE LEGAL CONSEQUENCES OF ITS OWN ACTIONS. IF A PARTICULAR CONGRESSIONAL ACTION CONSTITUTES LEGAL AUTHORITY FOR THE PRESIDENT TO UNDERTAKE A SPECIFIC OPERATION, I DOUBT THAT ONE CONGRESS CAN CHANGE THAT FACT FOR ALL FUTURE TIMES BY REQUIRING A SPECIFIC FORM OF APPROVAL.

Recent Cases

The War Powers Resolution was enacted in the shadow of U.S. involvement in the Vietnam War, and of the so-called Watergate scandals. In more recent years, however, issues have been raised under the Resolution in situations that bear no resemblance to the Vietnam War and, in fact, may not have been contemplated at the time of its adoption.

It is a regrettable reality in today's world that Americans abroad are increasingly subjected to murder, kidnappings and other attacks by terrorists who seek to further their political ends through such means. The hijacking last year of TWA Flight 847, with the murder of Navy diver Stethem, is a well-known recent example. In that case, we had no reason to believe that the Government of Lebanon had encouraged or otherwise supported the terrorists; it was simply unable to control them. In such a situation, the President may decide to deploy specially-trained anti-terrorist units in an effort to secure the release of the hostages or to capture the terrorists who perpetrated the act. Does the War Powers Resolution require consultation and reporting in this kind of situation?

We have substantial doubt that the Resolution should, in general, be construed to apply to the deployment of such anti-terrorist units, where operations of a traditional military character are not contemplated and where no confrontation is expected between our units and forces of another State. To be sure, the language of the Resolution makes no explicit exception for activities of this kind, but such units can reasonably be distinguished from "forces equipped for combat" and their actions against terrorists differ greatly from the "hostilities" contemplated by the Resolution.

Nothing in the legislative history indicates, moreover, that the Congress intended the Resolution to cover deployments of such anti-terrorist units. These units are not conventional military forces. A rescue effort or an effort to capture or otherwise deal with terrorists, where the forces of a foreign nation are not involved, is not a typical military mission, and our anti-terrorist forces are not equipped to conduct sustained combat with foreign armed forces. Rather, these units operate in secrecy to carry out precise and limited tasks designed to liberate U.S. citizens from captivity or to attack terrorist kidnappers and killers. When used, these units are not expected to confront the military forces of a sovereign state. In a real sense,

THEREFORE, ACTION BY AN ANTI-TERRORIST UNIT CONSTITUTES A USE OF FORCE THAT IS MORE ANALOGOUS TO LAW ENFORCEMENT ACTIVITY BY POLICE IN THE DOMESTIC CONTEXT THAN IT IS TO THE "HOSTILITIES" BETWEEN STATES CONTEMPLATED BY THE WAR POWERS RESOLUTION.

I MIGHT NOTE, IN THIS CONNECTION, THAT OTHER TYPES OF CASES INVOLVING MILITARY DEPLOYMENTS, SUCH AS THE MOVEMENT OF WARSHIPS INTO OR THROUGH FOREIGN TERRITORIAL WATERS, THE DEPLOYMENT ABROAD OF SECURITY PERSONNEL SUCH AS MARINE EMBASSY GUARDS, AND TRANSITS OF COMBAT AIRCRAFT THROUGH FOREIGN AIRSPACE, HAVE GENERALLY BEEN CONSIDERED TO BE OUTSIDE THE SCOPE OF THE RESOLUTION. THE RATIONALE FOR REGARDING THE RESOLUTION INAPPLICABLE IS AT LEAST AS STRONG IN THE CASE OF LIMITED, ANTI-TERRORIST DEPLOYMENTS AS IT IS IN THESE OTHER CASES, ABSENT THE INVOLVEMENT OF THE ARMED FORCES OF A FOREIGN STATE.

EVEN ASSUMING THE RESOLUTION WERE APPLICABLE TO THE DEPLOYMENT OF SPECIAL ANTI-TERRORIST UNITS, THE FACT IS THAT CONSULTATIONS MAY NOT -- AND GENERALLY WILL NOT -- BE POSSIBLE IN SUCH CASES. THE EXISTENCE AND PURPOSE OF THESE UNITS IS WELL-KNOWN TO THE CONGRESS. THE NEED FOR SWIFTNESS AND SECRECY INHERENT IN THE NATURE OF THOSE ACTIVITIES IS SO EXTRAORDINARY THAT CONSULTATIONS PRIOR TO DEPLOYMENT MIGHT

WELL JEOPARDIZE THE LIVES OF OUR UNITS AND THE HOSTAGES THEY MAY SEEK TO LIBERATE.

ISSUES UNDER THE WAR POWERS RESOLUTION HAVE ALSO BEEN RAISED WHERE U.S. FORCES HAVE ENGAGED IN A MILITARY EXERCISE IN CONFORMITY WITH INTERNATIONAL LAW. THE INCIDENT IN THE GULF OF SIDRA IN LATE MARCH ILLUSTRATES THE SITUATION. DOES THE RESOLUTION REQUIRE THE PRESIDENT TO CONSULT AND REPORT IN THIS KIND OF CASE?

SOME FACTUAL BACKGROUND WILL HELP TO PUT THIS QUESTION IN PERSPECTIVE. THE UNITED STATES IS COMMITTED TO THE EXERCISE AND PRESERVATION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS AROUND THE WORLD. THAT IS THE PURPOSE OF THE FREEDOM OF NAVIGATION PROGRAM. A DELIBERATE DECISION WAS MADE DURING THE CARTER ADMINISTRATION TO DISCOURAGE OR NEGATE UNLAWFUL CLAIMS TO EXTENDED JURISDICTION IN THE OCEANS. THAT POLICY WAS AFFIRMED IN 1982 UNDER PRESIDENT REAGAN, AND IN 1983 THE ESSENCE OF THE POLICY BECAME PUBLIC IN A STATEMENT ON U.S. OCEANS POLICY. THAT STATEMENT MADE CLEAR THAT THE UNITED STATES WOULD CONTINUE TO WORK WITH OTHER COUNTRIES TO DEVELOP AN ACCEPTABLE OCEANS REGIME. IT ALSO MADE CLEAR THAT THE UNITED STATES WOULD PROTEST THE UNILATERAL ACTS OF OTHER STATES DESIGNED TO RESTRICT THE RIGHTS AND FREEDOMS OF THE INTERNATIONAL COMMUNITY IN THE USE OF THE OCEANS, AND THAT

THE UNITED STATES WOULD EXERCISE AND ASSERT THOSE RIGHTS AND FREEDOMS ON A WORLDWIDE BASIS.

THE EXERCISE OF OUR RIGHTS PROVIDES VISIBLE AND POWERFUL EVIDENCE OF OUR REFUSAL TO ACCEPT UNLAWFUL CLAIMS. THE UNITED STATES HAS ACCORDINGLY PROTESTED AND EXERCISED RIGHTS AND FREEDOMS WITH RESPECT TO CLAIMS OF VARIOUS KINDS: UNRECOGNIZED HISTORIC WATERS CLAIMS, TERRITORIAL SEA CLAIMS GREATER THAN 12 NAUTICAL MILES, AND TERRITORIAL SEA CLAIMS THAT IMPOSE IMPERMISSIBLE RESTRICTIONS ON THE INNOCENT PASSAGE OF ANY TYPE OF VESSELS (SUCH AS REQUIRING PRIOR NOTIFICATION OR PERMISSION). SINCE THE POLICY WAS ESTABLISHED THE UNITED STATES HAS EXERCISED ITS RIGHTS AGAINST THE OBJECTIONABLE CLAIMS OF OVER 35 COUNTRIES, INCLUDING THE SOVIET UNION, AT A RATE OF ABOUT 30 TO 40 FREEDOM OF NAVIGATION EXERCISES PER YEAR.

THE UNITED STATES HAS FOLLOWED THIS POLICY IN CONNECTION WITH LIBYA. WHEN QADHAFI CAME TO POWER IN LIBYA, IT WAS NOT LONG BEFORE PRIVATE FIRMS SAW THEIR INTERESTS EXPROPRIATED. THEN, ON OCTOBER 9, 1973, QADHAFI BROADENED THE SCOPE OF HIS INTEREST IN EXPROPRIATING THE RIGHTS OF OTHERS, AND ASSERTED HIS CLAIM TO OWNERSHIP OF THE GULF OF SIDRA. THE UNITED STATES VIGOROUSLY PROTESTED THAT ASSERTION ON FEBRUARY 11, 1974, AND IN THE YEARS SINCE THEN WE HAVE EXERCISED OUR RIGHTS IN THAT AREA ON NUMERCUS OCCASIONS.

THE WAR POWERS RESOLUTION WAS NOT INTENDED TO REQUIRE CONSULTATION BEFORE CONDUCTING MANEUVERS IN INTERNATIONAL WATERS OR AIRSPACE IN THE CONTEXT OF THIS GLOBAL FREEDOM OF NAVIGATION PROGRAM. WE ARE AWARE OF NO PREVIOUS SUGGESTION THAT THE RESOLUTION WOULD REQUIRE CONSULTATION IN SUCH SITUATIONS. THIS QUESTION WAS CAREFULLY CONSIDERED IN CONNECTION WITH THE SIDRA EXERCISE IN MARCH, AND THE DECISION WAS MADE THAT THE CONDUCT OF THOSE OPERATIONS DID NOT PLACE U.S. FORCES INTO HOSTILITIES OR INTO A SITUATION IN WHICH IMMINENT INVOLVEMENT IN HOSTILITIES WAS "CLEARLY INDICATED BY THE CIRCUMSTANCES." THE UNITED STATES HAS CONDUCTED ITS EXERCISES NOT ONLY IN SIDRA BUT AROUND THE WORLD, NOT ONLY IN MARCH BUT FOR YEARS -- AND IN MOST INSTANCES WITHOUT HOSTILE RESPONSE. WE HAVE IN FACT BEEN IN THE GULF OF SIDRA AREA 16 TIMES SINCE 1981, AND WE HAVE CROSSED QADHAFI'S SO-CALLED "LINE OF DEATH" 7 TIMES BEFORE THE OPERATION LAST MARCH. ONLY ONCE BEFORE DID QADHAFI RESPOND WITH MILITARY ACTION, AND IN THAT INSTANCE HE WAS SINGULARLY UNSUCCESSFUL. WHILE WE MUST ALWAYS BE AWARE OF THE RISKS AND BE PREPARED TO DEAL WITH ALL CONTINGENCIES, WE HAVE EVERY RIGHT TO EXPECT THAT NEITHER LIBYA NOR ANY OTHER COUNTRY WILL TAKE HOSTILE ACTION AGAINST U.S. FORCES WHILE THEY ARE LAWFULLY IN AND OVER AREAS OF THE HIGH SEAS. THE THREAT OF A POSSIBLE HOSTILE RESPONSE IS NOT SUFFICIENT TO TRIGGER THE CONSULTATION REQUIREMENT OF SECTION 3, WHICH REFERS ONLY TO ACTUAL HOSTILITIES AND TO

SITUATIONS IN WHICH IMMINENT INVOLVEMENT IN HOSTILITIES IS "CLEARLY INDICATED" BY THE CIRCUMSTANCES.

WHERE A PEACEFUL, LAWFUL EXERCISE DOES IN FACT RESULT IN HOSTILE ACTION TO WHICH U.S. FORCES MUST RESPOND IN IMMEDIATE SELF-DEFENSE, SUCH AN ISOLATED ENGAGEMENT SHOULD NOT NORMALLY BE CONSTRUED AS CONSTITUTING THE INTRODUCTION OF U.S. ARMED FORCES INTO A SITUATION OF ACTUAL OR IMMINENT HOSTILITIES FOR THE PURPOSE OF THE REPORTING REQUIREMENT OF SECTION 4 OF THE RESOLUTION. NO REPORT WAS SUBMITTED IN THE CASE OF THE 1981 SIDRA INCIDENT, IN WHICH TWO LIBYAN AIRCRAFT WERE SHOT DOWN AFTER THEY FIRED AT U.S. AIRCRAFT. SIMILARLY, DURING THE PERIOD IN WHICH U.S. PEACEKEEPING FORCES WERE DEPLOYED IN THE BEIRUT AREA IN 1983, MANY INCIDENTS OCCURRED IN WHICH HOSTILE FORCES ATTACKED AND U.S. PEACEKEEPING FORCES RESPONDED IN IMMEDIATE SELF-DEFENSE. YET, NO SEPARATE WAR POWERS REPORT WAS SUBMITTED FOR EACH OF THESE INCIDENTS. OF COURSE, A DIFFERENT SITUATION MIGHT BE PRESENTED IF U.S. FORCES WITHDREW FROM AN AREA AND SUBSEQUENTLY RETURNED FOR THE PURPOSE OF UNDERTAKING FURTHER MILITARY ACTION.

AS A PRACTICAL MATTER, HOWEVER, THIS QUESTION SEEMS ACADEMIC. IN THE CASE OF THE MARCH INCIDENT IN THE GULF OF SIDRA, FOR EXAMPLE, REGARDLESS OF THE APPLICABILITY OF THE WAR POWERS RESOLUTION, THE ADMINISTRATION PROVIDED CONGRESS

WITH ALL THE INFORMATION IT NEEDED TO REVIEW THE INCIDENT. AS SOON AS HOSTILE LIBYAN ACTIONS OCCURRED, THE ADMINISTRATION TOOK STEPS TO ENSURE THAT CONGRESS WAS INFORMED OF THE SITUATION AND WAS KEPT INFORMED THROUGHOUT THE REMAINDER OF THE EXERCISE. IN PARTICULAR, SEVERAL CALLS WERE MADE TO CONGRESSIONAL LEADERS TO INFORM THEM OF THE EVENTS; EXTENSIVE BRIEFINGS WERE CONDUCTED FOR THE BENEFIT OF ALL INTERESTED MEMBERS, AT WHICH EXPERTS FROM THE DEPARTMENTS OF STATE AND DEFENSE PROVIDED PERTINENT INFORMATION AND RESPONDED TO ALL QUESTIONS ASKED BY MEMBERS; AND THE PRESIDENT SENT A WRITTEN REPORT TO CONGRESS DESCRIBING THE EVENTS OF MARCH 24 AND 25, THE ACTIONS TAKEN BY U.S. FORCES, AND THE LEGAL JUSTIFICATION FOR THOSE ACTIONS.

THE THIRD KIND OF SITUATION IN WHICH WAR POWERS CONSIDERATIONS HAVE BEEN RAISED RECENTLY IS THAT IN WHICH U.S. FORCES TAKE LEGITIMATE ACTION IN SELF-DEFENSE AGAINST FACILITIES OR FORCES OF ANOTHER STATE BECAUSE OF ITS SPONSORSHIP OF TERRORIST ATTACKS AGAINST AMERICANS. IN THE APRIL 14 OPERATION AGAINST LIBYA, U.S. FORCES UNDERTOOK MILITARY ACTION IN SELF-DEFENSE AGAINST FIVE TERRORIST-RELATED TARGETS IN ORDER TO PREEMPT AND DETER LIBYA'S UNLAWFUL AGGRESSION THROUGH TERRORIST FORCE AGAINST THE UNITED STATES AND ITS NATIONALS. DOES THE WAR POWERS RESOLUTION APPLY TO A CASE OF THIS KIND?

THE USE OF U.S. FORCES TO CONDUCT A MILITARY STRIKE AGAINST THE FACILITIES OF A HOSTILE, SOVEREIGN STATE IN ITS OWN TERRITORY FALLS WITHIN THE SPECIFIC TERMS OF THE CONSULTATION REQUIREMENT OF SECTION 3 OF THE RESOLUTION. IN THIS CONTEXT, HOWEVER, A CRITICAL ELEMENT IS FLEXIBILITY. AS INDICATED EARLIER, SECTION 3 EXPRESSLY ENVISIONS THE POSSIBILITY THAT IN SOME INSTANCES THE PRESIDENT MIGHT HAVE TO ACT WITHOUT PRIOR CONSULTATIONS. IN ANY EVENT, HE MUST SEEK TO CONSULT IN A MANNER APPROPRIATE TO THE CIRCUMSTANCES, AND THE NEED FOR SWIFTNESS AND SECRECY IN CARRYING OUT A MILITARY OPERATION IS A VITAL FACTOR TO BE WEIGHED IN DETERMINING THE NATURE AND TIMING OF CONSULTATIONS THAT MAY BE APPROPRIATE IN A GIVEN SITUATION.

IN THE CASE OF THE APRIL 14 OPERATION, EXTENSIVE CONSULTATIONS OCCURRED WITH CONGRESSIONAL LEADERS. THEY WERE ADVISED OF THE PRESIDENT'S INTENTION AFTER THE OPERATIONAL DEPLOYMENTS HAD COMMENCED, BUT HOURS BEFORE MILITARY ACTION OCCURRED. THIS SATISFIED THE RESOLUTION'S REQUIREMENT THAT CONSULTATION OCCUR "BEFORE" THE "INTRODUCTION" OF TROOPS INTO HOSTILITIES OR A SITUATION OF IMMINENT HOSTILITIES. CONGRESSIONAL LEADERS HAD AMPLE OPPORTUNITY TO CONVEY THEIR VIEWS TO THE PRESIDENT BEFORE ANY IRREVOCABLE ACTIONS WERE TAKEN (IN FACT, NO ONE WHO WAS CONSULTED OBJECTED TO THE ACTIONS UNDERTAKEN). THE PRESIDENT TOOK A SERIOUS RISK IN

CONDUCTING THESE CONSULTATIONS. THE PRESS OBSERVED LEGISLATIVE LEADERS ENTERING THE WHITE HOUSE FOR THE CONSULTATIONS, AND SPECULATION ABOUT POSSIBLE MILITARY ACTION ENSUED. THE PRESS ALSO LEARNED IMMEDIATELY AFTER THE CONSULTATIONS THAT THE PRESIDENT WAS TO MAKE AN ADDRESS LATER THAT EVENING, AND THIS LED TO RUMORS OF IMMINENT MILITARY ACTION THAT COULD HAVE JEOPARDIZED THE SUCCESS OF THE OPERATION.

THE CONSULTATIONS IN THIS CASE WERE CONSISTENT WITH THE PROVISIONS OF THE WAR POWERS RESOLUTION. THEY WERE ALSO CONSISTENT WITH AND IN MANY RESPECTS EXCEEDED IN SCOPE AND DEPTH THE CONSULTATIONS CONDUCTED ON PREVIOUS OCCASIONS. FOR EXAMPLE, PRESIDENT FORD'S MEETING WITH CONGRESSIONAL LEADERS TO DISCUSS THE MAYAGUEZ OPERATION OCCURRED AT A POINT IN TIME MUCH CLOSER TO THE ONSET OF MILITARY ACTION THAN WAS THE CASE HERE. PRESIDENT CARTER, AS I NOTED EARLIER, DID NOT CONSULT AT ALL PRIOR TO THE TEHRAN RESCUE MISSION.

WHERE A MILITARY ACTION CONSTITUTES THE INTRODUCTION OF U.S. FORCES INTO ACTUAL OR IMMINENT HOSTILITIES FOR THE PURPOSE OF THE CONSULTATION REQUIREMENT OF SECTION 3 OF THE RESOLUTION, THE ACTION ALSO TRIGGERS THE REPORTING REQUIREMENT OF SECTION 4. IN THE CASE OF THE APRIL 14 OPERATION, THE PRESIDENT SUBMITTED A FULL REPORT CONSISTENT

WITH THE WAR POWERS RESOLUTION. AS THE PRESIDENT NOTED IN HIS REPORT, THE ACTIONS TAKEN WERE PURSUANT TO HIS AUTHORITY UNDER THE CONSTITUTION, INCLUDING HIS AUTHORITY AS COMMANDER IN CHIEF. THAT AUTHORITY IS MOST COMPELLING IN A SITUATION SUCH AS THIS, WHERE THE USE OF FORCE IS ESSENTIAL TO DETER AN IMMEDIATE AND SUBSTANTIAL THREAT TO THE LIVES OF AMERICANS.

IN RECENT WEEKS THE QUESTION HAS BEEN RAISED PUBLICLY AS TO THE PRESIDENT'S RIGHT TO TAKE MILITARY ACTION WITHOUT THE EXPRESS APPROVAL OF CONGRESS. THIS IS A QUESTION THAT HAS BEEN ADDRESSED BY EXECUTIVE BRANCH OFFICIALS ON MANY OCCASIONS OVER THE YEARS, AND THEIR STATEMENTS ARE WELL-KNOWN TO THIS COMMITTEE. WITHOUT GOING INTO THE SPECIFICS OF THOSE STATEMENTS, IT IS CLEAR THAT THE LIMITED ACTIONS UNDERTAKEN BY PRESIDENT REAGAN IN RESPONSE TO ATTACKS ON THE UNITED STATES AND ITS CITIZENS FALL WELL WITHIN THE PRESIDENT'S AUTHORITY UNDER THE CONSTITUTION. AS NOTED EARLIER, THE WAR POWERS RESOLUTION DOES NOT CONFER POWER ON THE PRESIDENT, BUT IT CLEARLY RECOGNIZES THAT THE PRESIDENT HAS INDEPENDENT CONSTITUTIONAL AUTHORITY TO TAKE APPROPRIATE MILITARY ACTION.

IT IS ALSO IMPORTANT TO NOTE, IN THIS REGARD, THAT THE PRESIDENT IS NOT SIMPLY ACTING ALONE, UNDER HIS INHERENT CONSTITUTIONAL AUTHORITY, WHEN TAKING THE TYPES OF ACTIONS WE

60-907 O - 86 - 2

ARE DISCUSSING TODAY. THE CONGRESS HAS, OVER THE YEARS, LEARNED OF, CONSIDERED, AND EFFECTIVELY ENDORSED IN PRINCIPLE THE USE OF U.S. FORCES FOR A VARIETY OF PURPOSES THROUGH ITS ADOPTION OF LAWS AND OTHER ACTIONS. MOST SIGNIFICANTLY, CONGRESS HAS AUTHORIZED AND APPROPRIATED MONEY FOR THE CREATION OF FORCES SPECIFICALLY DESIGNED FOR ANTI-TERRORIST TASKS. FOR EXAMPLE, SECTION 1453 OF THE 1986 DEPARTMENT OF DEFENSE AUTHORIZATION ACT SPECIFICALLY STATES THAT IT IS THE DUTY OF THE GOVERNMENT TO SAFEGUARD THE SAFETY AND SECURITY OF U.S. CITIZENS AGAINST A RAPIDLY INCREASING TERRORIST THREAT, AND THAT U.S. SPECIAL OPERATIONS FORCES PROVIDE THE IMMEDIATE AND PRIMARY CAPABILITY TO RESPOND TO SUCH TERRORISM; AND THE CONGRESS HAS APPROPRIATED FUNDS FOR THE SPECIFIC PURPOSE OF IMPROVING U.S. CAPABILITIES TO CARRY OUT SUCH OPERATIONS. LIKEWISE, THE CONGRESS HAS APPROPRIATED CONSIDERABLE SUMS TO CREATE THE NAVAL AND AIR FORCES THAT ARE NEEDED TO RESPOND TO AND DETER STATE-SPONSORED TERRORIST ATTACKS IN THE MANNER THAT WAS DONE ON APRIL 14, AND TO CARRY OUT THE EXERCISES NECESSARY TO MAINTAIN SUCH CAPABILITIES AND TO ASSERT AND PROTECT OUR RIGHTS ON THE HIGH SEAS. IN THIS SENSE, CONGRESS HAS PARTICIPATED IN THE CREATION AND MAINTENANCE OF THE FORCES WHOSE FUNCTION, AT LEAST IN PART, IS TO DEFEND AMERICANS FROM TERRORISM THROUGH THE MEASURED USE OF FORCE. THE PRESIDENT HAS OPENLY DISCUSSED AND EXPLAINED THE NEED FOR AND PROPRIETY OF THESE USES OF FORCE.

WHICH HE HAS CORRECTLY ASSUMED ARE WIDELY SUPPORTED BY CONGRESS AND THE AMERICAN PEOPLE. ALL OF THE ACTIONS UNDERTAKEN WERE CLEARLY SIGNALLED WELL IN ADVANCE, AND THEREFORE POSED NO THREAT TO THE ROLE OF CONGRESS UNDER THE CONSTITUTION IN MILITARY AND FOREIGN AFFAIRS.

CONCLUSION

IT SEEMS FAIR TO SAY, IN CONCLUSION, THAT IT IS NOT CLEAR HOW THE WAR POWERS RESOLUTION, WHICH WAS ORIGINALLY DESIGNED TO PROVIDE AN APPROPRIATE ROLE FOR THE CONGRESS WITH RESPECT TO U.S. INVOLVEMENT IN HOSTILITIES WITH OTHER STATES, SHOULD APPLY TO THE USE OF U.S. FORCES IN OTHER KINDS OF SITUATIONS. SOME SUCH SITUATIONS -- THE DEPLOYMENT OF ANTI-TERRORIST UNITS -- WOULD SEEM TO FALL COMPLETELY OUTSIDE THE SCOPE OF THE RESOLUTION. OTHER SITUATIONS -- THE CONDUCT OF PEACEFUL, LAWFUL EXERCISES WHICH RESULT IN A HOSTILE RESPONSE -- DO NOT REQUIRE CONSULTATIONS BUT, SOME MIGHT ARGUE, MAY IN SPECIAL SITUATIONS REQUIRE A REPORT. STILL OTHER CASES -- THE USE OF U.S. FORCES IN A LEGITIMATE, DEFENSIVE STRIKE AGAINST ANOTHER STATE -- CAN CLEARLY BE SAID TO FALL WITHIN BOTH THE CONSULTATION AND THE REPORTING PROVISIONS, BUT WITH THE FORM OF CONSULTATION NECESSARILY VARYING WITH THE PARTICULAR CIRCUMSTANCES.

A CONSIDERATION OF THE APPLICATION OF THE WAR POWERS RESOLUTION TO SITUATIONS SUCH AS THESE DOES MORE THAN RAISE DIFFICULT AND INEVITABLY CONTROVERSIAL ISSUES OF INTERPRETATION. ON A BROADER LEVEL, IT ALSO HIGHLIGHTS SOME OF THE SIGNIFICANT NEGATIVE ASPECTS OF THE WAR POWERS RESOLUTION, WHOSE EFFECTS ON THE CONGRESS ARE PERHAPS EVEN MORE PROFOUND THAN ON THE EXECUTIVE. THE NEED THAT SOME MEMBERS OF CONGRESS FEEL TO DEFEND THE RESOLUTION'S VIABILITY, EVEN IN SITUATIONS WELL BEYOND THOSE CONTEMPLATED AT THE TIME OF ITS ADOPTION, CAUSES CONGRESS TO SHIFT ITS CONCERN, DELIBERATIONS, AND POLITICAL LEVERAGE AWAY FROM EVALUATING THE MERITS OF MILITARY ACTIONS TO TESTING THEIR LEGALITY, AND TO FOCUS ON FORMAL AND INSTITUTIONAL ISSUES RATHER THAN ON THE SUBSTANCE OF OUR POLICIES. OUR HISTORY AMPLY DEMONSTRATES THAT CONGRESS HAS ADEQUATE MEANS, THROUGH THE BUDGETARY PROCESS AND OTHERWISE, TO PROVIDE AN EFFECTIVE CHECK ON PRESIDENTIAL POWER TO EMPLOY MILITARY FORCE. BUT THE WAR POWERS RESOLUTION OFTEN UNWISELY DIVERTS OUR LEADERS FROM ISSUES OF POLICY TO ISSUES OF LAW.

I WILL BE HAPPY TO RESPOND TO QUESTIONS FROM YOU AND OTHER MEMBERS OF THIS SUBCOMMITTEE.

THANK YOU.

VALIDITY OF CONGRESSIONAL INVOLVEMENT IN POLICY QUESTIONS

Chairman FASCELL. Well, Judge, your statement was fine in terms of skirting the issues so that you would not have to come in conflict with your own writings, until you got to that last statement. And I am sorry that you felt constrained to make that last statement.

It seems to me that when the Congress questions the propriety of an action with regard to the Constitution of the United States, when it appears as if the Constitution has either been swept aside or reinterpreted to suit a particular situation, it is not a waste of time to call to the attention of the American people that the United States may be going to war without the consent of the Congress.

So except for the last statement——

Mr. SOFAER. Well, I certainly did not mean to suggest, Mr. Chairman, that I regard you as wasting your time. I think you would see that I have taken this——

Chairman FASCELL. But if leaders of the Congress are diverted from the merits of the military action into a discussion of the constitutional question surrounding that action, according to your statement, that is an unfortunate waste of time.

Now, let me just remind you that with respect to the invasion of Grenada, we did not hold any hearings on Grenada. Congress simply accepted the Presidential position that he can go to war to save American lives. Fortunately, the operation was successful, and I would suppose that through the acquiescence of the Congress, not by formal action, that the constitutional requirement was met. I think a reasonable person could say that. I do not know of any court decision to that effect, but I think reasonable people could agree.

COMPLIANCE WITH THE CONSTITUTIONAL PROCESS

Now, with respect to the application of war powers, it has always been a question of interpretation of the facts. That is the reason for the War Powers Resolution, to give the Congress and the Chief Executive an opportunity to talk about the facts and then determine whether or not the resolution applies, and then get into the question as to whether or not a specific act of consultation is indeed sufficient consultation.

And, as I said at the start of this discussion, there is always a question of negotiation. Anybody can write their own scenario in such a way that there is no way the War Powers Resolution could apply. As a matter of fact, we have people writing scenarios nowadays so that the Constitution does not apply. And that is the issue. Are we, the American people, going to accept the proposition that the world has changed so drastically that we can just forget this old fashioned, stodgy Constitution that said only Congress can declare war, and that Congress must act to declare war.

Are we going to forget that, and let the President, because he is Commander in Chief and allwise, go to war whenever he wants to, and then have the Congress come in after the fact and decide whether or not we are going to supply the money to continue the warfare or in some other way ratify and accept the action, either

by acquiescence or by some formal resolution? If that is the way we are going to do it, so be it. But let us talk about it and let us make a decision.

I do not want to worry about the constitutional process if we are not going to pay any attention to it. I think we ought to either amend it or abolish it. But as long as it is there, and as long as the law is there, it seems to me that we have a responsibility to at least discuss the matter and make decisions, the most important of which is meeting the constitutional requirement of the Congress of the United States to take this country to war.

WAR POWERS AND ANTITERRORISM POLICY

Now, I support the use of military force against a country that supports terrorism. The only question then remaining is, should the Congress take some formal action prior to the fact and grant authority to the President to use military force as he sees fit against any country in the world because that country is supporting terrorism. When an act of terrorism has occurred and Americans have been killed and injured, under the theory of self-defense and the right to protect American citizens, the President can commit our troops as he sees fit without the Congress having been consulted, and in fact having to acquiesce in the act because it is a reasonable and sensible use of military force. That is the issue.

Now, I do not expect the administration to come to the Congress requesting legislation to give the President the power he says he has under the Constitution. And that power, as enunciated by him, until it is changed, is the President's interpretation of the Constitution and is the official policy of the United States. And that declaration, as I understand it, says to the American people, to the Congress, and to the world, that the United States will respond with military force against any country in the world when the President determines that that country has supported or committed an act of terrorism.

That is the only issue. You can say it is not an act of war. You can say it is in hot pursuit. You can write all kinds of rationales for it, but the only real issue is, does the Constitution come into play or does it not?

Mr. Broomfield.

NEED FOR SECRECY IN PLANNING COUNTERTERRORISM OPERATIONS

Mr. BROOMFIELD. Thank you, Mr. Chairman.

First of all, Judge, I want to compliment you on your review of this entire situation. I find it very complicated, because I do support the President in what action he has taken recently. I think he has fully complied with the War Powers Resolution.

What troubles me is that some members have this attitude, particularly now that we are dealing with terrorists, that we ought to have a notice of belligerency from Congress before any action is taken. I think you mentioned that when the previous administration was in power, there was no consultation whatsoever that I can recall in regard to Iran. I was one of those who were invited over to the White House, along with the chairman and several on the other side of the aisle.

And I noticed at that particular time the difficulties.

Each member was followed very carefully, and the newspaper people had some idea that something was developing. And they were trying to figure out why all these Members were going to the White House at 4 o'clock in the afternoon. And so they were starting to put the pieces together.

Fortunately, the White House and the administration kept us over there quite late; otherwise, I think more information would have gotten out. I guess that is really what troubles me. Given the sensitive matter of air strikes, and dealing with terrorists, there must be a degree of secrecy. And I do not know how you get around this. Sure, I want Congress consulted. But you cannot give the Congress much time in advance. In other words, I think what the President did was proper.

S. 2335

Now, I notice there have been several bills introduced. Senator Dole recently introduced Senate S. 2335, in regard to war powers and counter-terrorism, the Anti-terrorism Act of 1986, which exempts counterterrorists and military actions from requirements of the War Powers Act.

Again, we all agree that consultations are very desirable and helpful to both the executive and the legislative branches of Government.

There are, however, occasions when time pressure will be so great and antiterrorist operations will be so dangerous that it will be impossible or imprudent to reveal them in advance, even to Congress, or even through the very act of conducting consultation.

What are your views on that?

Mr. SOFAER. On the bills?

Mr. BROOMFIELD. Yes.

Mr. SOFAER. The proposed bills?

We certainly appreciate the intent of those bills and the support that they reflect for the President's policies. We do not think that the passage of those bills is necessary for us to continue doing those essential things in the national interest that are being done.

So we have no official policy of supporting those bills. We certainly regard Congress as having the power to consider in advance the policies which the President has articulated. If you think that we have adopted the wrong policies, tell us so. We would certainly be controlled by your power to a significant extent.

I think you have a way, even in those situations, to tell us that you either support or oppose policies that are being proposed or have actually been implemented. And that is what these bills would do. They would tell us that Congress supports the policies that the President has adopted.

If you adopted a bill that told us that you oppose using force at all when an American has been killed abroad in order to deter further acts of force against Americans, that would be a very significant message. The Congress' power is immense in this area. When you told a President, President Ford, not to go into Angola, your power was certainly overwhelming in that instance, and your orders were obeyed.

So I think that you have the power to tell us what to do and what not to do. On the other hand, we are telling you we have been honest with you, we have been open with you, as to what our policies are, and what the difficulties of consulting in advance are in this kind of a hostage rescue type operation. We have to figure out another way of having Congress express its will with respect to those policies than come in and talk about a specific operation the disclosure of which could result in the deaths of innocent people.

ADMINISTRATION CLAIMS COMPLIANCE WITH WAR POWERS RESOLUTION

Mr. BROOMFIELD. Judge, the bottom line, then, is that you feel that the administration has complied fully with the War Powers Act——

Mr. SOFAER. Certainly.

Mr. BROOMFIELD [continuing]. And I am wondering whether or not you have any recommendation that further consideration ought to be given to a change in the consulting procedures in regard to this new era of antiterrorism.

Mr. SOFAER. I think that any constructive suggestion that would be made about how consultations would become more secure and more effective would be welcomed and discussed. I think we have to have these discussions quietly between the principals involved, and if ideas, good ideas, are developed, we certainly will cooperate with them and participate in those discussions.

WAR POWERS RESOLUTION AND COUNTERTERRORIST OPERATIONS

Mr. BROOMFIELD. But again, you do not believe that in dealing with the terrorist situation that it comes under the War Powers Act.

Mr. SOFAER. I do not. I think that even if it did, it would not be possible to consult in most of those situations.

Mr. BROOMFIELD. I thank you.

NATURE OF CONSULTATION

Chairman FASCELL. Will the gentleman yield?

Mr. BROOMFIELD. Yes. I would be glad to.

Chairman FASCELL. I appreciate your statement, judge, and you are right. One of the purposes of the War Powers Resolution was to establish a basis for the kind of dialog we are now having because you get into a question of what is proper consultation and nobody wants to tie the hands of the President in the case of an emergency.

But let us take the question which was raised by Mr. Broomfield. As far as I am concerned, I am not interested in the battle plan. I am not interested in how many airplanes, how many men, what day, or what time of the night a strike is about to take place. As one of the original authors of the War Powers Resolution, that was never was my intention. Those are highly secret battle plans, and all that is required under the law is for the President to carry out the consultation requirement to the best of his ability.

It does not say anywhere he has got to disclose detailed plans to the press or the Congress. But in this last case, just to talk about

the adequacy of consultation, of course that was consultation in the technical sense. But you could also say it was mere notification. We went down there at 4 p.m. and we were told: Gentlemen, you will be happy to know a decision has been made. Planes are in the air.

And then the maps were dragged out, and we were given all the details. About halfway through, somebody said, well, do you have any objection. Well, of course, nobody objected.

That is not the purpose of consultation, to discuss the specific military plans of an operation. Technically, I guess, the airplanes at that point had not gone beyond the point of no return. I would hate to measure that specifically, but I will give the benefit of the doubt and say they were not past the point of no return. And let it go at that, and say that technically there was compliance.

ADVANCE CONSULTATION

But there is a way to engage in consultation in advance. That would be, for example, to call in whoever seem to be the right people in matters of this kind—and that is another issue. Do you just call in the President of the Senate and the Speaker of the House, some people and not other people? That is an important issue for the President to make a decision on, but he has total control over that. Nobody is pinning him down.

He could say, for example: gentlemen, we have this kind of problem, either specifically with country X or with any number of countries. We have 10 options available to us. We have tried one, two, three, four, and they all failed. Now, we are down to 6 to 10. How do you ladies and gentlemen feel about these options? And that is it. You do not have to say, I am contemplating doing this, that, or the other. But at least the Congress has had some input into the problem and maybe some expression of opinion with respect to the solution.

Now, the final decision is always the President's. He makes it, and Congress, as you have pointed out, has ample authority to act afterward by either ratifying, supplying the money, passing a resolution, or doing a whole host of other things that would indicate its support or lack of support. So, I do not think that is a particular problem.

And therefore, I hope that we will continue this dialog, with Mr. Broomfield's help and others, to achieve a method that meets the consultation requirement.

SUGGESTION FOR CONSULTATION PROCEDURE

Mr. SOFAER. I would like to take that message back with me, Mr. Chairman. I want to be sure I am reading you correctly.

Are you suggesting that you would welcome the President's setting up discussions with the legislative leaders to discuss in principle the question of the use of force in the types of situations that we are talking about here today?

Chairman FASCELL. Absolutely. And also with respect to specifics if it is, as the statute provides, possible to do so. But again, I am one person. I am not interested in the battle plan. I am not a general, but I certainly have some common sense with regard to the application of policy and the use of force.

Mr. Solarz

APPLICABILITY OF WAR POWERS RESOLUTION TO COUNTERTERRORIST STRIKES

Mr. SOLARZ. Thank you very much, Mr. Chairman. Let me first of all compliment you for holding these hearings. I think they are not only very timely but very important.

Judge Sofaer, you choose your words very carefully. Precisely for that reason I was somewhat concerned by what seemed to be a suggestion on your part that any response by the United States to acts of terrorism abroad, regardless of the nature of the response, does not fall under the War Powers Act.

For example, I can think of situations, presumably you would agree, that do fall under the provisions of the War Powers Act. For example, supposing we come to the conclusion that a foreign government is sponsoring and supporting acts of terrorism against American citizens and, after reviewing all of the options, the President concludes that the only solution lies in an invasion of that country in an effort to remove physically the government then in power. In other words, the President decides that a random military strike or a covert operation is inadequate.

Presumably under those circumstances, even though it was the acts of terrorism which precipitated the American response, it clearly would fall under the provisions of the War Powers Act, possibly even the Constitution with respect to the need for a declaration of war. Wouldn't you agree?

Mr. SOFAER. Well, put aside the "possibly" about the Constitution. We are talking about the War Powers Resolution. I think my testimony is clear; I said that I thought that the attack on Libya on April 14 falls squarely within the purpose and words of the War Powers Resolution.

Mr. SOLARZ. Even though it was in response to acts of terrorism.

Mr. SOFAER. Of course.

DECLARATION OF WAR

Mr. SOLARZ. Fine. I did not think you meant what you seemed to be implying in your response to Mr. Broomfield, but I am happy that that has been clarified for the record.

On this question of the constitutional responsibility of the Congress to issue declarations of war, are there any circumstances in the modern age under which you think a declaration of war by the Congress would be necessary, and are there any circumstances under which you think it would be desirable, as distinguished from using the mechanisms of the War Powers Act?

Mr. SOFAER. Well, the question of the need or the propriety of declarations of war is now an extremely complicated question under both international law and domestic law. And I do not want to get myself into the trouble that Mr. Katzenbach got himself into here years ago by talking about the fact that a declaration of war is not necessary.

I would like to say, though, two things. First, historically declarations of war have been rare. We have only had five declared wars. We have had over 200 military actions. The Congress itself has col-

lected those actions and published them in the Congressional Record. So, the normal military action in the United States is one which is done without a declaration of war.

The quasi-war with France, a naval war, was our first war. It was called a quasi-war because it was undeclared. And Mr. Chairman and Congressman Solarz, a Supreme Court case actually addressed the question of the legality of that undeclared war, and upheld it. The court found, essentially, that Congress had approved the war through legislation, and some other actions.

Now, the United Nations Charter, makes aggression unlawful. After the United Nations Charter there is considerable doubt in my mind whether a nation should go to war, whether there is such a thing as a formal legal notion, of war.

Our policy has been that the use of force by the United States is restricted by the United Nation's Charter. We are not allowed to use force unless it is either authorized by the Security Council or it falls within the inherent right of self-defense under article 51.

Mr. SOLARZ. But if it falls under the right of self-defense—assuming a legitimate case can be made that we are acting in pursuance of our right of self-defense—wouldn't a declaration of war under certain circumstances be appropriate?

Mr. SOFAER. Internationally, it is certainly not necessary. Domestically I think it is just as legal and just as appropriate for Congress to authorize military action through a law as it is through a declaration of war or a resolution.

CIRCUMSTANCES THAT COULD REQUIRE DECLARATION OF WAR

Mr. SOLARZ. Well, it is precisely because these are complicated questions that I am soliciting your views on this. Let me give you an example.

We can all distinguish between an isolated response to a particular action by a foreign government, like the raid against Libya, and a more systematic and sustained application of military force designed to bring about a change in policy in a foreign government, induce the removal of that government, or take over the territory at least for a period of time of that foreign state.

Supposing we decided that our interests required us either multilaterally or unilaterally to launch a military operation against Libya that involved not only the Air Force and the Navy, but ground forces as well, for the purpose of bringing to an end what we believe to be acts of aggression by Libya against American individuals and facilities around the world, and that decision was made by the President after consulting with National Security Council.

Under those circumstances, clearly the War Powers Act would be involved. Do you think under those circumstances a declaration of war would either be required or advisable? And if not, why not?

PRIOR LEGISLATIVE APPROVAL

Mr. SOFAER. I think the issue would be: should prior legislative approval be sought in some appropriate form. I do not think a declaration of war as such would be necessary, certainly not. But the question is—as raised by the chairman—whether prior legislative approval should be sought.

Now, the War Powers Resolution itself says, the President must seek legislative approval after 60 days, and that that approval must refer to the War Powers Resolution. It does not say the President must obtain a declaration of war. There just is not any authority legally for the proposition that the Nation has to declare war before it goes into what we talk about in our normal every day lives as war.

Mr. SOLARZ. Well, then what is the meaning of the provision in the Constitution, article I, section 8, which I have before me, which says the Congress shall have the power, among other things, to declare war?

Mr. SOFAER. A declaration of war, particularly historically, is a very significant thing. It is a significant power. When a state declares war, it triggers historically that concept in international law known as unlimited hostility. During unlimited hostilities a state's armed forces do a vast range of things that would not be appropriate in more limited hostilities.

So, I think it is very important that Congress has the authority to declare war. But that does not mean either that Congress cannot approve what in colloquial terms would be a war effort, and it does not mean that the President cannot use military force.

AUTHORITY GRANTED UNDER DECLARATION OF WAR VERSUS WAR POWERS RESOLUTION

Mr. SOLARZ. I would appreciate it if you could submit for the record in more detail an explanation of precisely what authorities would be triggered if we were to declare war that would not be triggered if we were to authorize the use of force pursuant to the War Powers Act through the adoption of a resolution authorizing the use of our forces.

ASSERTION OF CLAIM OF FREEDOM OF NAVIGATION

Mr. Chairman, if I could just ask one other question here.

You discussed at some length, Judge Sofaer, in your testimony this question of freedom of navigation and our determination going back to the Carter administration, to physically manifest our position on a decision when other countries assert claims over the seas which we do not recognize.

From the point of view of international law, if another country asserts a territorial claim as Libya has done in the Gulf of Sidra which we do not recognize, is it sufficient for us to simply assert we do not accept or recognize that claim or must we physically manifest our claim by sending ships into the area where we believe we have a right to go?

Or, in the absence of such a physical assertion, is there any argument that, by virtue of not having physically challenged it, we have implicitly accepted the claim of the foreign government?

And to the extent that it is important physically to challege the claim, how many times do you have to do it in order to make the point?

You have indicated in your testimony we have manifested our claim on several occasions. My question is how much is enough? Are we obligated every month to send a ship across the "Line of

Death" lest Qadhafi be in the position to go before a court and say the Americans have accepted our position because they did not send in a ship this month.

Mr. SOFAER. I think you raise a very good question, and if you would indulge me, I would like to spend a couple of minutes dealing with it.

It is important to understand the law, the applicable law, in order to understand the importance and significance of the actual exercise of the right of passage. The juridical test normally applied to determining whether a bay is owned by a given territory is in the 1958 Territorial Sea and the Contiguous Zone Convention, and it is essentially that it be a well marked indentation on the coast and that the distance across the mouth of the bay be more than 24 miles. Colonel Qadhafi has claimed a 300-mile line, so he could not conceivably come within the Convention. He relies, if on anything, on the claim of an historic bay.

The test for a historic bay is that the bay must constitute the integral borders of that state, and you look at the following criteria. One, continuous and notorious exercise of sovereignty over the area by the state claiming the historic right. And two, acquiescence in the exercise of sovereignty by other states; that is, you look and see if Libya continually and exclusively exercised sovereignty over that area. And too, did other states, such as the United States, acquiesce in that sovereignty?

The United States by maintaining its rights and exercising them, contrary to Libya's claim of sovereignty over the Gulf of Sidra, makes it clear that there is no acquiescence. We have not acquiesced historically and will not do so as long as we continue to exercise our rights, from time to time.

I am particularly concerned with the notion that the United States should forego the exercise of its rights because Libya, and particularly Colonel Qadhafi, threatens force. The implications of acquiescence in such a position are clear and unacceptable. The law abiding nations of the world would be forced to defer to such claims for fear of causing an irrational leader to use unlawful force against the peaceful exercise of navigational rights.

This sort of deference would reward arrogance and madness in international affairs. And the more arrogant and irrational the leader, the greater would be his reward.

EXERCISE OF RIGHT DESIRABLE IN CERTAIN SITUATIONS

Mr. SOLARZ. Judge Sofaer, I do not disagree with what you said, but with all due respect, I do not think you have really answered the question. The question is: Is it sufficient for us to maintain our rights, or do we actually have to exercise them? And if we have to exercise them, how long do we have to do it?

Mr. SOFAER. We would say that it is sufficient for us to prove even verbally that Mr. Qadhafi has no right to the Gulf of Sidra. But there are many, many cases on this in international tribunals, and many of them rely on the notion of acquiescence.

And it is like in domestic law a claim of adverse possession. You have to make sure that someone does not have that claim and make sure that your rights are protected. You do not have to go in

there repeatedly every week in order to do that, but you have to make a judgment. How often do we need to go in there to make it clear in the face of this claim? The more strident the claims he makes, the more necessary he makes it for us to go in there to prove our nonacquiescence in those claims. That is one of the ironies of the situation.

Chairman FASCELL. Ms. Snowe.

ANTITERRORIST UNITS AND REQUIREMENTS OF THE WAR POWERS RESOLUTION

Ms. SNOWE. Thank you, Mr. Chairman.

Judge Sofaer, on page 9 of your testimony you have mentioned that antiterrorist units are not conventional military forces and, therefore, fall outside of the scope of the applicability of the War Powers Act.

I would be interested on what basis you make that determination because obviously Delta Forces and other antiterrorist units come under the jurisdiction of the Department of Defense. They are military forces. They do not consider themselves policemen. Obviously they consider themselves soldiers first.

So, on what basis do you make that determination, and second, when we use antiterrorism units, we obviously do increase the likelihood of retaliation by a specific country, as well as inviting the involvement of their foreign troops.

Mr. SOFAER. Well, with respect to the first question, I can tell you that the elements of these forces are classified, as you know, and I could not discuss them here with you today. I can only tell you that I consulted with attorneys that represent the DOD and with attorneys that represent the Joint Chiefs of Staff and with military people about the nature of these forces. And my opinion stated in this testimony is based on those consultations.

With respect to the second part of your question, I certainly agree with you. This could lead to a confrontation with a foreign state, and where that could happen, where there is a good chance of that happening, where we are aware it is quite clear that it will happen because the state supports terrorism, the War Powers Resolution should be taken into account.

STATE SPONSORED VERSUS INDIVIDUAL ACTS OF TERRORISM

Ms. SNOWE. In your definition for controlling the use of terrorism, whether or not it falls outside the scope of the War Powers Act, on what basis do you make your determination of a state sponsored terrorism, and do you make a distinction between state sponsored terrorism, if we are going to take action against state sponsored terrorism vis-a-vis action against individual terrorists or groups of terrorists.

Mr. SOFAER. Well, the distinction has to be made. The State of Lebanon, for example, we strongly believe did not support the terrorists who hijacked the TWA aircraft. On the other hand, the State of Iran was clearly supporting the terrorists and people who had our hostages locked in our embassy, and Qadhafi is clearly supporting the terrorists who attacked our people in Berlin.

So, thus far I think we have had some pretty easy cases after the evidence has accumulated. But where there is doubt, I would follow the spirit that the chairman has stated, and we would ask ourselves, is there really a chance that the state involved will take offense. In making this judgment, we may even be able to communicate with the state involved. Egypt was able to communicate with Malta before it came in with its own forces to take over that plane. And we have been able to do that, get clearance, even informal clearance from states for various things.

Where we could get clearance from the state to act, we would assume that we would not have the problem of a confrontation. But where there is a chance for confrontation with a sovereign state over the use of our Delta Force, even though it is not normally a conventional force, certainly not when acting alone, we would have to take the War Powers Resolution fully into account.

EXECUTIVE POSITION ON S. 2335

Ms. SNOWE. Judge Sofaer, what about Senator Dole's legislation and others who have introduced it in the House to have all apparent terrorist powers of intervention by the Government exempt from the War Powers Act? Do you think that that is necessary? Is that legislation that the administration would support?

Mr. SOFAER. We appreciate the spirit behind, the motive for, that legislation. The administration has no position at this point on the legislation, and I do not think the legislation is necessary for any of the things we are doing.

DEFINITION OF HOSTILITIES

Ms. SNOWE. On page 13 of your testimony in referring to section 3, you say that threat of a possible hostile response is not sufficient to trigger the consultation requirement of section 3 which refers only to actual hostilities. And I am interested in the word "actual" because that is not used in the War Powers Act in section 3. It only refers to consultation with Congress before introducing the U.S. Armed Forces into hostilities or into situations where imminent involvement in hostilities are clearly indicated.

So, could you explain to me where you get the word "actual" because I see that quite differently than imminent.

Mr. SOFAER. Oh, well, if you read on, I said that the resolution has two categories: hostilities, which I assume to be actual hostilities, and the other category being situations in which imminent involvement in the hostilities is clearly indicated. I do agree with your interpretation of that. And I did not mean to suggest anything diffferent.

DEFINITION OF CONSULTATION

Ms. SNOWE. Finally, do you think—I would like your definition of the consultation. Do you think that consultation suggests approval by the Congress, for example, in consulting with the leaders of the Congress prior to or during the initiation of military action against Libya?

Do you think that that does constitute a required authorization or approval by congressional leaders?

Mr. SOFAER. No, I do not think that that constitutes approval by the Congress. I think that the President has the responsibility to act in certain situations and assumes the risk for his actions. And that is the historic separation and division of powers between the President and Congress. We are not shirking our responsibility.

Ms. SNOWE. So, in other words, you are referring to the meeting that did take place three hours before the strike. If the congressional leaders, for example, had objected or conveyed disapproval of that mission, that obviously would have still taken place.

Mr. SOFAER. I do not know about that at all.

Ms. SNOWE. Well, had they expressed disapproval.

PRESIDENT REQUIRES CONGRESSIONAL SUPPORT

Mr. SOFAER. I would not agree with that. Let me say that most emphatically. Put aside the War Powers Resolution for a minute. Let's just talk about America and how our system works here.

The President needs the support of Congress. He cannot do anything in the world without your support. And if he gathers the leadership in the White House and discusses with them a particular strike that may be underway, and significant opposition is expressed against it, I would not say that the President would not change his mind. I would certainly say that he would take that fully and properly into account.

The President is well aware, more aware perhaps than any President in this century, of the need to get along with Congress and to do things that Congress will accept. So, if there had been opposition expressed, the President would have taken it into account, and then exercise his judgment. And then he would have been responsible for the exercise of his judgment.

All I said in my testimony was that none of the Members that were consulted on that day in fact expressed any opposition. Some went out of their way to make it clear that they were not approving. On the other hand, they also said they were not opposing.

Ms. SNOWE. Thank you very much, Judge. Thank you, Mr. Chairman.

Chairman FASCELL. Mr. Berman.

UNILATERAL USE OF FORCE BY THE EXECUTIVE

Mr. BERMAN. Thank you, Mr. Chairman.

I would like to just explore your statement in the prepared testimony regarding section 8(a) of the War Powers Act and your statement on the issue of whether the President has the right to take military action without the express approval of Congress. You indicate that it has been raised publicly. Who has raised the question that the President has no right to take military action without the express approval of Congress?

Mr. SOFAER. Oh, I think many people have raised the question.

Mr. BERMAN. Including the——

Mr. SOFAER. I see the chairman raise his hand.

Chairman FASCELL. Let the record show I was waving to one of the former members. [Laughter.]

Mr. SOFAER. I have statements that I could supply to you, Congressman.

Mr. BERMAN. Your answer to the question that apparently has been raised over and over again, and perhaps by the chairman, is not clear to me. You say that it is clear that the limited actions undertaken by President Reagan in response to attacks on U.S. citizens fall well within the President's authority under the Constitution, and that authority is?

Mr. SOFAER. Under the Commander in Chief clause and under the power over foreign affairs and under the power to ensure that the laws of the United States are implemented.

Mr. BERMAN. While it is probably really dangerous to develop hypothetical scenarios, would those same powers have authorized the President's right to conclude in the case of Libya that the situation was such to demand a full invasion?

Mr. SOFAER. I would not want to go into that hypothetical either.

GENERAL UNDERSTANDING IMPLICIT IN CREATION OF ANTITERRORISM UNIT

Mr. BERMAN. Your next paragraph implies that whatever other authorities the President would have, that the creation of an antiterrorism unit by Congress somehow provides specific authoritv for a specific response over and above and apart from any other particular powers—this is at the bottom of page 18—page 19.

Mr. SOFAER. I do not say that it provides specific authority for specific responses. I say that Congress has considered and effectively endorsed in principle the use of U.S. forces for a variety of purposes. So, to the contrary. I am not saying that Congress has endorsed or taken responsibility for particular uses of force by doing that. It is just that as a practical matter in our constitutional framework, I think when Congress expresses as clearly as it has its support for its special forces to engage in antiterrorist operations, has funded the development of those forces, has urged the Department of Defense to get on the stick over the years and get better about providing these forces to the President to use as Commander in Chief, that Congress is saying something not about specific events or activities, but it is saying something about what is a wise and appropriate policy for the United States to adopt with respect to terrorists who seize Americans or murder Americans who might be deterred or captured through the use of these kinds of forces.

Mr. BERMAN. So, you're really saying nothing more than, as a generalized proposition, even apart from the question of whether or not express approval is needed, that there is a generalized understanding in the creation of those units much like there is a generalized understanding in the creation of an army and a navy and an air force, that the power of self-defense and the power to resist aggression implies that Congress has spoken at least in this general sense.

Mr. SOFAER. Yes.

EXECUTIVE WAR POWERS AND SPECIFIC STATUTORY AUTHORITY

Mr. BERMAN. Now, section 8(a), you expressed some concerns about its constitutionality. Before we get to it constitutionality,

what is that supposed to say? As I read it very quickly, it looks like it says there is no authority to be taken from any appopriation, for example, for the funding of the counterterrorism in Libya, or any other general provision of law which constitutes specific statutory authority. It does not specifically authorize the introduction of U.S. Armed Forces into hostilities or into such situations, and states that it was intended to constitute specific statutory authority within the meaning of this joint resolution.

What is all that about? And how does that section relate to the whole 60 day provision which requires 60 days after those hostilities are initiated? There is a resolution process set forth?

Mr. SOFAER. Well, to the extent that I am familiar with the history of that provision—and the chairman can correct me if I am wrong—there was extensive discussion during the history of that provision about Congress' power to prevent the President and the courts, even the courts, from determining that Congress through appropriations and other actions had approved some military action beyond the 60 day period.

Mr. BERMAN. This is for the issue of beyond——

Mr. SOFAER. Yes.

Mr. BERMAN. This is somehow—some other law would be used to say the 60 day resolution is not needed.

Mr. SOFAER. Right.

Mr. BERMAN. And you think that is unconstitutional, again, for what reason?

Mr. SOFAER. Well, I think that if Congress had, as a legal matter, let us say, adopted a law and paid bills and passed resolutions, that make it clear that they have approved something let us say in 1986, the fact that Congress in 1973 purported to make it clear that it cannot approve anything without specifically referring to the War Powers Resolution, would not prevent a court from finding that Congress did approve something. So, that is what I am saying.

I seem to recall the chairman agreeing with that statement somewhat earlier in the remarks.

Mr. BERMAN. So that you believe that, in fact, the executive branch can infer from appropriations measures, other legislation, et cetera, enacted subsequent to the War Powers Act that that introduction of hostile activity or whatever reference you made to it is all right, notwithstanding the 60 day limitation of the War Powers Act.

Mr. SOFAER. Yes. And Congressman, let me just say that philosophically I feel that way because I think it is preferable from the viewpoint of a lawyer advising his client to look to more limited claims of authority, claims based on a partnership between the President and Congress, rather than to more extravagant, broader claims, based on unilateral authority as a justification for what the President does.

I am naturally drawn in advising my client to evidence that Congress will approve of what he is going to do, and not as drawn to arguments based on unilateral action. So, I think it is a healthy thing for all of us to look to what Congress approves of and disapproves of through legislation of various kinds before the President decides on what exactly he is going to do.

Chairman FASCELL. That is an interesting way of putting it.

Mr. Hyde.

PROBLEMS WITH FORMAL DECLARATIONS OF WAR

Mr. HYDE. Thank you, Mr. Chairman.

Judge Sofaer, it just seems to me a declaration of war and a formal effort to declare war—I do not think we will ever achieve that.

That is just one of several good reasons for not formally declaring war is that a lot of other laws then automatically trigger in—such as trading with the enemy: If we declared war on Libya, then every other country that trades with Libya would be our enemy.

Treason—anybody who disagreed with our policy might well be guilty of treason.

Censorship of the press—there is a litany of laws that kick in once a formal declaration of war is made; and we are then not dealing with an adversary; we are dealing with an enemy.

And, in addition, a psychological momentum develops, for example, if we declared war against Vietnam then China has to declare war against us, and this momentum develops for everybody declaring war on everybody, and it is just not going to work anymore.

So, I would—I suggest that what is needed and what we do not have, because the courts have been not very helpful in this, some new approach to the powers of Congress in declaring war.

What does that really mean now that wars or declarations are anachronistic?

And the power of the President as Commander in Chief—we do not really have that line drawn, and, as we move into an era of wars of terrorism, wars of subversion, we ought to get our laws and even our Constitution out of the Smithsonian and into the modern era.

That would require some scholarship and some people who are above politics. I think we could get the former; I am not sure we could get the latter.

Now, I am not a fan of the War Powers Resolution, contrary to my chairman, who I am a fan of, I might add. [Laughter.]

QUESTIONS CONCERNING CONSULTATION REQUIREMENT

Mr. HYDE. I think the War Powers Resolution is hopelessly vague besides providing a timetable for your adversaries when we'll get out, which is not, in my humble opinion the smartest thing we can do, it says the President shall "consult with Congress."

Well, who is Congress?

If this was a criminal law, it would be hopelessly vague. "Congress" could be the leaders. It could be the whole leadership team. It could be the ranking members of relevant committees. Who knows?

But it could be just two people, one person. Consult with Congress. It ought to tell us a little bit more about that.

The meeting that happened 3 hours before the strike on Libya—well, that was such a hot meeting that two Senators went out and told the press: Watch the television at 9 o'clock, tonight.

That was around 6 o'clock before the planes had moved in there.

So, we have a problem, in addition to living up to the letter and the spirit of the War Powers Act, of trying to keep a secret around here. And I would like to see Congress, when we are finished dotting the I's and crossing the T's, and dancing on the heads of pins, or whatever it is we want to do with our time, take a look at how stories like this, what they do to the country; what they do to our national security.

And I am speaking of an article of April 25, 1986, in the Washington Post—and I quote:

> Since 1981, the CIA—under authorization by President Reagan—has provided about $500,000 a year to support propaganda and resistance tactics by an anticommunist group of Ethiopian dissidents, according to informed sources. In recent months, senior administration officials have begun preliminary planning for covert paramilitary training of armed guerrillas committed to overthrowing the current Ethiopian regime, the sources added, although no decision has been made by the White House on whether to provide munitions or other lethal aid.

Does that not bother you? It bothers me. I will not ask if it bothers you, but it bothers me that we cannot keep a secret; and yet we are insisting on all of these consultations.

You know and I know that if Grenada had not occurred the way it did we would still be debating. Now, Congress says, "Oh, we came aboard later on." After they said no, we sent people down there to look at the thing and they changed their mind after they talked to the people after the fact.

I remember several famous legislators who were outraged, in a high dudgeon, when this event occurred, and after they went down there and found out what was going on, they became supporters of what happened.

Now, I am not sure that the War Powers Resolution is constitutional under the *Chadha* decision; and, for once in my life, I wish we had advisory opinions from the Supreme Court—at least on this issue, because we are going to be in a hell of a fix if we have to have a court test when the troops are committed, and the President says "I won't report," or "I won't consult."

I do not know how we will ever learn whether or not it is constitutional. But let me just say one more thing: We have some real practical problems in living up to the letter and the spirit of the War Powers Resolution.

PROBLEMS WITH CONFIDENTIALITY

Daniel Schorr wrote an article in an op-ed piece in the Washington Post quoting a Congressman, now deceased, Leo Ryan.

Leo said that if he did not agree with the policy he felt that it was his duty and obligation to disclose that program and policy or action.

Now, I dare say there are others that feel that way, too. That means, though, I do not know how you undertake to defend the security of this country if some Member of Congress finds out about an important covert policy, and disagrees with it.

I can think of many confidential, covert activities that have appeared in the press that have probably cost lives—probably cost lives, and certainly spoiled the activity.

So, we have a lot of work to do, and, in my judgment, it goes beyond whether or not the letter or the spirit of the War Powers Resolution was lived up to in this context.

I can remember in 1975, 3 weeks of debate on whether President Ford could conduct a humanitarian evacuation in Vietnam. And the Congress never did reach that resolution, and the President was forced to act unilaterally on his own authority, to save American and Vietnamese lives.

I am not demeaning Congress. I am a Member of Congress, but I am saying in a world that is changing and a world that is increasingly dangerous, and in a country that is increasingly politicized, we have to take a fresh look at how we protect ourselves in this very dangerous world.

I am not going to ask you anything; I am just expostulating, but I feel better for it.

Thank you.

Chairman FASCELL. Mr. Lantos.

ISSUES OF POLICY VERSUS ISSUES OF LAW

Mr. LANTOS. Thank you, Mr. Chairman.

Let the record show that I am not only a fan of yours but a fan of Congressman Hyde and I largely agree with much of what he says. [Laughter.]

Mr. LANTOS. Judge Sofaer, I am profoundly disturbed by your testimony, probably more so than any of my colleagues. Let me tell you why: As a prefatory note, let me tell you that I fully support the President's action. I was the first on the floor of this House to express my support and did so in the media.

I feel he grasps the importance of international terrorism and he is absolutely correct in putting it on the top of our agenda.

Sunday night in California I had dinner with my younger daughter, who is an international lawyer, and while Mr. Shultz has you to consult, I have her to consult. I told her about our meeting today, and I asked her what her testimony would be if she would be in your position, representing the State Department.

To my great pleasure as I listen to you, since I have the highest regard for your legal qualifications, her line of argument was almost identical to yours.

Then I posed another question. I asked her, what would you say if your job was the opposite; if you were the lawyer for the other side, saying that you did not feel it was right. She answered, you did not consult enough. You should have consulted earlier, better, more effectively.

Then she gave an equally good argument.

I am coming to your last paragraph, which disturbs me no end, because I think you drew the wrong conclusions from it, as you tell us to deal with issues of policy, not issues of law.

I could not agree with you more. I was taught that if you want an opinion from a lawyer who will tell you all the reasons why you shouldn't do something, you go to a downtown lawyer; and if you want to find out how you can get away with it, you go to an uptown lawyer.

CONSULTATION WILL INCREASE PUBLIC AND CONGRESSIONAL SUPPORT

I think you are arguing the uptown lawyer case for this administration, and that is the wrong case to argue. What we are facing now is a gigantic educational job for the American people, to recognize that international terrorism is a new kind of war, how we need to wage it, and there is nothing the international terrorists would like to see more than, (A), division among the American people, and, (B), division with our allies.

It seems to me, Judge Sofaer, your job is to persuade your client that they should go way beyond what the law requires in consultation. That is the only way we will build the kind of cohesion and support that you need.

The reason why the Libya action has been so widely supported by the American people, over 70 percent plus, is because Senator Kennedy and Speaker O'Neill and our chairman and much more humble Members of Congress like myself, have supported the President. Now, it is inappropriate and unwise to irritate Members of Congress by diverting them to the legal issues by raising questions, legitimate questions, of inadequate consultation, nontimely consultation.

How on God's green Earth can one justify the fact that the French were consulted 3 days in advance and our congressional leadership was consulted 3 hours in advance?

By what constitutional principle does President Mitterrand and the Prime Minister of France, Monsieur Chirac, have the right to 3 days of consultation and the chairman of the House Foreign Affairs Committee, 3 hours of consultation?

I think you have to step back, with all due respect, Judge Sofaer, and be a downtown lawyer and tell the administration why this is not the way to do it.

The way to do it is to do it as early as possible, as comprehensively as possible, and, as our chairman suggested, nobody here wants the war plans. You want to see laid out the options, the possible scenarios, policy decisions, and get, if I might suggest, the not inconsiderable wisdom of accumulated experience on the Hill, in dealing with these issues.

It is a fact that the leadership in both bodies is infinitely more experienced in these matters than any President, because the President usually comes in from some other job. The people here have been in foreign affairs for 20 or 30 years. It would not be unwise to give them the courtesy that Mr. Mitterrand got.

My feeling is that you must recognize, and the administration recognize, that this is not an issue of law, it is an issue of policy. You will win the battle and you will lose the war for the support of the Congress and the American people. I speak as one who strongly supports the action.

I am grateful for your comments.

NATURE OF CONSULTATION WITH EUROPEAN ALLIES

Mr. SOFAER. Good. I appreciate it.

Thank you, Congressman. I know of your support, and we appreciate it very much.

Let me say that, first, while there were consultations with European allies, those consultations did not even resemble in content the consultations that occurred with our own legislative leadership, that the material communicated, the detail and substance of those consultations was nowhere near the clarity and message that was communicated by the President to our own legislative leadership.

Mr. LANTOS. With all due respect, Judge Sofaer, how could that be possible when operational details had to be discussed with our European allies as we asked them for overflight rights?

Mr. SOFAER. No, there were operational details discussed, undoubtedly in extremely close channels, but that was for the purpose of, as you said, surprise.

And I must say that I think that those limited kinds of discussions are not consultations. We were not asking their advice and their support in the political sense that you would be asking the support of a legislative leader.

Those were necessary in order to ensure that our planes would be able to take off and return to that base, and in order to try to minimize the length of time, the distance that those planes would have to fly.

But, normally, we would not even have to engage in that kind of discussion, and I think where we would not have to engage in it, we would not have such discussions.

We certainly would not, as a matter of policy, communicate more extensively with foreign leaders than we do with our own.

NEED TO DEVISE METHOD FOR PRIOR CONSULTATION

Mr. LANTOS. Well, if I may just follow on with one quick question, Mr. Chairman.

Chairman FASCELL. By all means.

Mr. LANTOS. Those of us who are deeply committed to a bipartisan foreign policy desperately feel the need for an existing mechanism, not an ad hoc mechanism, of prior consultation.

I fully agree with Mr. Hyde that there is a great problem of leaks which come both from the Congress and from the administration, but it should not be beyond our capability to devise a mechanism that would have 3 days of prior consultation time rather than 3 hours.

Mr. SOFAER. Well, I think that, in effect, we do get a lot of prior consultation time on the policy involved. In connection with Libya, this confrontation has been building up for years. We have tried other means; we tried economic sanctions——

Mr. LANTOS. I agree on the policy.

AWARENESS ON DEVELOPMENT OF ANTITERRORISM POLICY

Mr. SOFAER. That is the point, that everybody was aware of each stage in the progress in the development of that policy, including Congress, and most recently when the attacks occurred in Rome and in Vienna, the President went out of his way to say that he regarded state-sponsorship of terrorism as a form of aggression under the U.N. Charter, and that we would exercise our rights under article 51.

So, there was a clear message with respect to the policy of the United States in such a situation.

Then, an incident occurred. We had this overwhelming proof, and there is no surprise to what the President did unless you happen to be a person who does not believe the President.

The President is a person who says what he is going to do, and, in due course, that is what happens; and he signaled this openly.

I must say, as I said earlier, Congressman Lantos, that we are willing to sit down and work on other devices that would enable the congressional leadership and the Executive leadership to discuss these questions of policy in advance. I am willing to do it. I know the President is willing to do it. I think that is the way to handle this.

I do not think that you can take particular incidents and say, "Well, what amount of consultation would have been just right here, and what amount would have been just right there?"

That is the exercise that I think diverts us from the substance of policy, and you have not engaged in that exercise, I fully admit. Everything, in fact, that has gone on here today has been substantive; and I have tried to respond. I think we would respond substantively to discussions about our policies and we should.

NEED FOR CONSULTATION IN BROADEST SENSE

Mr. LANTOS. You are better served by overdoing consultation than by underdoing the consultation.

Mr. SOFAER. Yes, but I think the consultation that you use there is the consultation in a broader, political sense, and not the consultation that happens to be written in words in the War Powers Resolution.

We have to go much beyond the War Powers Resolution. I agree with you. We have got to come to Congress; we have got to get the money for special forces; we have to talk to you about what is a terrorist-supporting state and what is not. We have to get your concurrence in the fundamental ongoing policy that we are following all over the world. I agree with that.

Chairman FASCELL. Mr. Gilman.

SUPPORT FOR FORMALIZATION OF THE CONSULTATION PROCESS

Mr. GILMAN. Thank you, Mr. Chairman.

We welcome Judge Sofaer before us, and I would like to add that both the gentlemen from Illinois and the gentleman from California have made very valuable contributions to this debate.

I think, on the one hand, we are concerned about too extensive a consultation process that could lead to leaks, and, on the other hand, that we maintain a structure pursuant to the intent of the War Powers Resolution to provide a reasonable consultation so that Congress is involved in the process and so that there is a balance between the branches—which is like the one that the Constitution initially established between the major branches of Government.

And I think that there is a broad consensus in the Congress for a need for expanding, redefining and possibly formalizing the consultation process.

I would ask of you, Judge Sofaer, in our review of such a redefinition, do you have any specific recommendation of how this process could be made more effective; and, at the same time, provide the kind of security that the gentleman from Illinois was concerned about.

NEED FOR CONSULATION ON BROAD POLICY CONSIDERATIONS

Mr. SOFAER. Well, I would turn away from the discussion of specific incidents.

Let us take an example of an incident that I think everyone would agree does not come within the War Powers Resolution at all that occurred as part of our antiterrorist effort, and yet is one which I think Congress has as much to say on, and should have as much to say on, as anything else. The *Achille Lauro* incident, and the fact that we used our military planes to divert a military aircraft of a foreign state containing, as we knew, a terrorist group that had committed a terrorist incident in international waters.

Now, there is an instance in which we used the Armed Forces of the United States in international airspace. We did not enter into any other area. It was not governed by the War Powers Resolution at all. We had no time to discuss that, to consult on it. We did not even know until the last few perhaps even minutes whether we were right, whether the numbers on the plane were the right numbers that we had been told about. And the President had to decide right then and there, were we going to go ahead or were we not?

Now, it seems to me that we have a duty to come to you and tell you clearly that those are the kinds of things we contemplate doing, and to be open and up-front about it, and to hear what you have to say to us about the wisdom of those things.

Do you think we should ever divert an aircraft in international airspace? We are ready to hear about that; we are ready to discuss it. We think that there is a difference, for example, between a military aircraft or a state aircraft and a civilian aircraft. And we feel much more prepared to divert a state aircraft, which is the situation in the *Achille Lauro* incident, than a civilian commercial airliner with passengers on it. Are we correct in that judgment? Are we correct in feeling that we should never divert a civilian passenger airliner unless—I do not even know whether we ever should. Frankly, I have not even thought about that. We would be extremely reluctant to even contemplate such a diversion. There is an area not covered by the War Powers Resolution, and yet we need to talk about it.

Mr. GILMAN. Have we talked about it?

Mr. SOFAER. We have not talked about it.

Mr. GILMAN. Why do we not talk about it?

Mr. SOFAER. I am willing to talk about it. I am willing to hear from Congress as to what are the right policies. I am willing to tell you what our policies are, and I am willing to hear what you think our policies should be.

Mr. GILMAN. Well, that would be an appropriate example, then, of what we are talking about: An initiative by the administration to sit down and talk about these broad policy considerations, to avoid these conflicts for the future.

Mr. SOFAER. Well, I do not think it is unheard of. I think the administration has made these policies in various areas clear to Congress. The fact is that Congress sometimes—often—does not want to take a position in advance on a given policy or its application to given circumstances.

Congress, rightly I think, wants the President to take the risk of a policy judgment with respect to the the use of force in these sorts of areas. And the President has to be prepared to face that, to make that decision, and take that risk.

All I am saying, Congressman, is that if Congress wants to play a role in this process, the power is certainly there. I recognize it. And the opportunities are there. It is difficult to call these shots.

CONGRESSIONAL GROUP ON COUNTERTERRORISM STRATEGY

Mr. GILMAN. Well, I think some discussion of the kind of policy considerations that you are now suggesting could be very helpful, and perhaps you could initiate that kind of a discussion to avoid some of these problems for the future.

Senators Lugar and Nunn have suggested that the President consult earlier in the decisionmaking process with a small congressional group that would consider a counterterrorism strategy.

What is the feasibility of that approach?

Mr. SOFAER. An overall counterterrorism strategy?

Mr. GILMAN. Yes.

Mr. SOFAER. I think that would be a very constructive idea.

Mr. GILMAN. It is an example of what you are talking about.

Mr. SOFAER. I think that is a very constructive idea.

PRESIDENTIAL COMMISSION REPORT ON ANTITERRORISM STRATEGY

Mr. GILMAN. Some contend that the spread of terrorism creates a new global situation requiring new procedures for congressional participation in shaping these kind of decisions. Again, are there any additional specific recommendations that you would have besides this kind of consultation on terrorism as we look over what reforms might be needed or appropriate?

Mr. SOFAER. Well, one thing comes to mind right now. There is a commission formed by the President that is considering terrorism.

And they have made many recommendations. Many of those are classified, but they are available to you, to the committee. That report will eventually take the form of a Presidential directive that incorporates those recommendations of which the President approves.

Now, it seemed to me that national policy is being made there with respect to terrorism, and Congress has an opportunity to comment on that report, to participate in that process through legislation or through other means, such as these hearings, or closed hearings.

Mr. GILMAN. You are referring to the Inman report?

Mr. SOFAER. Yes.

Mr. GILMAN. I assume that with all of this discussion that you still are an advocate of the underlying objectives of the War Powers Act, but recognize a need for reforms or redefinitions?

Mr. SOFAER. Well, in effect, I am saying the War Powers Resolution should not limit the President in his consultations with the Congress and in his reports to Congress. The President should go much beyond the War Powers Resolution. The President realizes that he needs your support, and he needs to explain what he is doing to you, and I think he has. I think he has clearly signaled his policies in these areas.

Mr. GILMAN. Thank you, Judge Sofaer.

Thank you, Mr. Chairman.

Chairman FASCELL. Mr. Levine.

DIFFERING VIEWS ON NATURE OF CONSULTATION

Mr. LEVINE. Thank you, Mr. Chairman.

Thank you for your testimony, Judge. It has been very educational and interesting to me, and I think it helps to pinpoint some of the complexity and subtlety that we are dealing with in some really tricky and difficult areas.

I must say that I have been concerned about your responses to the prior two members, both the gentleman from New York, Mr. Gilman, and my colleague from California, Mr. Lantos, in terms of the direction that you seem to be moving in, in, if I read you correctly, that you essentially believe that the principal thrust of consultation in this area is with regard to policy in general, and even in particular, but that when we get into very specific actions, that it is difficult to employ consultation in quite the same fashion.

And I guess my concern is that even though I understand the sensitivity and trickiness and subtlety and difficulty of direct consultation in counterterrorism activities, I do not see that as so different from other forms of military activity that it should be treated differently in the context either of the War Powers Act or in the context of consultation in general, with some limited exceptions. I think your *Achille Lauro* example is a good example, and I think in the context of the *Achille Lauro* there just was not the opportunity. And I do not think that you heard any criticism, complaints, or concerns raised from the Hill about the response procedurally or substantively, but the response at least procedurally with regard to the *Achille Lauro,* because I think there was an understanding that that was a specific situation with the facts on the ground being what they were that required an immediate response at the time that the Egyptian plane, for example, was in the air. We had to respond immediately.

But that is unique and that is different, particularly, from this most recent situation with regard to Libya. And while you, I am certain, are completely accurate in terms of differentiating the quality of the consultation between the administration and our congressional leaders on the one hand, and our allies on the other hand, it does continue to at least raise questions, regardless of the comparative quality of the consultations, that we would be consulting with our allies 3 days in advance and with Congress 3 hours in advance.

MECHANISM FOR ADVANCE CONSULTATION

And I guess my concerns are twofold, specifically. One is whether or not we might be able to develop a mechanism even in antiterrorist activities, and perhaps particularly in antiterrorist activities, not the *Achille Lauro* type, but the response to state-sponsored terrorism when we know we are planning a response in advance, whether or not congressional leadership ought not to be included earlier and more extensively in that process.

And I guess my concern with your response that we should respond to policy is this. You said the President has made a series of statements, and only those who do not believe the President are not essentially notified as to what is occurring, to paraphrase your response.

POLICY IMPLICATIONS OF PRESIDENTIAL STATEMENT

Well, look. The President did also respond, for whatever reasons and in whatever fashion, recently by saying if we have state-sponsored terrorism by the Syrians, if we have state-sponsored terrorism by the Iranians, we are likely to respond to that, essentially in the same fashion that we responded to the Libyans. Meaning no disrespect to the President, the Secretary of State then, I think appropriately, tried to pull back a little bit in terms of the implications of that statement within the next 24 hours.

I do not think that you want Congress now coming to you immediately after the President's speculative response with regard to Syria and Iran saying, is this the policy? Are we about to have a military strike now with regard to Syrian-sponsored terrorism and Iranian-sponsored terrorism?

But if we are left with the option of responding only to general policy statements and not to specific counterterrorist activities, particularly when they involve military action, then we have no choice but to come to you whenever there is this type of a statement, particularly one from the President, and saying, consult, consult in more detail, consult with more specifics.

And unless we can get to the specific counterterrorist, military action that is being contemplated, then Congress is being removed from the essential warmaking, whether it is a declaration of war or not, but commitment to military force responsibilities that Congress is vested with in the Constitution.

CONSULTATION ON POLICY VERSUS SPECIFIC ACTION

So I—it was a longwinded way of getting to the question—but I, for those reasons, remain distressed, I would say, and concerned by what appears to be your response to my colleagues—respond to the policy, consult on the policy, but not on the specific action. Because it is in fact the specific action that will be the issue from time to time and in one instance or another.

Mr. SOFAER. Well, I do not think the record will show that I said we should consult on general policy but not on specific actions. I was emphasizing the area in which I think we could make the most progress in developing new methods for consulting and a greater depth of consultation.

So let me reassure you that the one thing is not a substitute for the other. We all recognize how difficult it is to consult on these specific operations. Even the Libya strike, you suggested that that may be so different from the *Achille Lauro* incident. Yet secrecy there was critical, absolutely critical. A 12-minute strike in which, if the enemy knew in advance that our planes were going to be there, we could have lost many more planes and many more lives, and the strike might have been much less effective.

So I think most of these types of actions require the kind of secrecy that *Achille Lauro* diversion required.

NEED TO MAINTAIN SECRECY RECOGNIZED BY CONGRESS

Mr. LEVINE. If I can just follow up very briefly, and I see that my time is expired, I must say that your response disturbs me as well, because we are all concerned about leaks; we are all concerned about secrecy; we are all concerned about surprise.

But the implication of your response, at least as I hear it, is that consultation with Congress is inconsistent with maintaining secrecy. And if in fact that is the attitude of the administration, I think we have a very serious problem with regard to the constitutional responsibilities that remain vested with the Congress.

Mr. LEVINE. And if I can simply add that in my experience here, and I have been here only two terms, but in my experience here, I must tell you that I have been extremely sensitive to this, because it is an issue that was brought to my attention upon first arriving. And I think that our Government does not do nearly as well as we ought to in the area of secrecy.

But if you do compare the track record of the legislative and executive branch over the time that I have been in this city, the legislative branch, frankly, I think, does a lot better than the executive branch. I think there is room for improvement on both.

But I do believe that if there is no means of ensuring secrecy by adequate and complete consultation with Congress, then we have a serious constitutional problem.

LEAKS BY EXECUTIVE BRANCH ACKNOWLEDGED

Mr. SOFAER. Well, I meant to reassure you, not to disturb you. I was simply saying that I emphasize the prior policy discussions, the value of them, because I think in that area we can do even more.

We should try also to improve consultation with respect to specific incidents. I agree with you. And we are willing to work with you to try to develop better ways. We think that the executive branch is at least as responsible for leaks as the congressional branch is. No question about it in my mind. I have no doubt the President of the United States trusts the chairman more than he does me. I have no doubt whatsoever.

Mr. LEVINE. I did not intend to get into that.

Mr. SOFAER. No, I just want to make it clear that we completely agree with your attitude in that regard. There are just practical rules of confidentiality controlled by military personnel, mainly, that apply in that context that we do not have in the preliminary area where we can discuss policy. And there I would say, why not

raise the question right now about the possibility of antiterrorist actions against states other than Libya. Why not?

If you want to discuss that policy, why not discuss it now? It seems to me that it is appropriate to discuss it now, in the abstract. The Secretary of State has made it clear we have no such plans right now. So it is still a policy that could lead to such plans in the future if we find evidence of state involvement in a specific murder of American civilians. That is our policy; why not talk about it if you have some doubt about it?

I think the American people and the American Congress, you, Congressman Lantos and others, have been strong supporters of this policy, and I have a feeling that you support us on this.

NEED TO DEFINE CONGRESSIONAL ROLE IN POLICYMAKING PROCESS

Chairman FASCELL. Well, we are discussing the policy, Judge. That is the reason for the hearings.

Mr. SOFAER. Right.

Chairman FASCELL. The President has enunciated the policy. It is the policy of the United States.

Mr. SOFAER. Where you do not support us, it is pretty clear. Take Central America. I mean, I think the extent of Congress' power is felt clearly.

Chairman FASCELL. Well, that concerns supplying the money, which is a congressional responsibility. That is the only hold the Congress really has over a Chief Executive. And I support giving him the money—that is beside the point.

Mr. SOFAER. Yes.

Chairman FASCELL. The point is that he cannot do it unless he takes the money from someplace else or gets the authority to conduct the war. In the final analysis, if the money is not there, he cannot very well conduct the war as Commander in Chief.

Mr. Leach.

CONGRESSIONAL ROLE IN INSURING COMPLIANCE WITH THE LAW

Mr. LEACH. Thank you, Mr. Chairman.

Judge, I would like to raise two attitudinal concerns that have policy implications, and the first is one that the Chair raised at the beginning of his discussion, and that is, frankly, I am, like the Chair, concerned with the conclusion of your testimony where you suggest that congressional concern for the legal and institutional issues is apparently misplaced. What we really should be concerned with is substance.

My personal view is that whether you like or dislike a particular law, in the executive you are obligated to comply with it, and in the Congress where we write laws, we have an obligation to see that they are at least overseen.

In particular in the area of terrorism, particularly in a democratic society, what we are really talking about is the rule of law. And as far as I am concerned, the best antidote to terrorism could well be strict adherence to the rule of law on our side.

The second attitudinal objection I have, and this one I feel very strongly about, is the assertion, as a representative of the executive, the description of Congress as one that wants the executive to

take the risk. And I would just like to say as calmly as I can, that might apply to some Members of Congress, but that description has all sorts of attitudinal implications. It says, we can run roughshod and then let Congress cry.

And I would only say, from the perspective of this Member of Congress, that we want the law complied with, and that I think on that issue I speak with unanimity, whether or not every Member of Congress wanted to be consulted on this particular issue, or to have the luxury to play the role of Monday morning quarterback is another matter.

RECOURSE AVAILABLE THROUGH INTERNATIONAL LEGAL FRAMEWORK

But I would like to go and touch on a couple of points, and one which is absolutely new in the context of these discussions, and I think it is very relevant to this particular committee.

In your testimony on page 11, you touched on the problem of U.S. oceans policy, in the aspect that this administration is committed to, among other things, overseeing the notion that the 12-mile limit is honored around the world.

Well, another approach is that that relates to the law of the sea, which is a series of treaties that has been torpedoed which would have ensconced in international law more firmly than it currently is, although I think it is a matter in most acceptability of commonly accepted international law.

But if the United States and Libya had both been signatories and ratifiers of the Law of the Sea Convention, it is conceivable that this issue of the line of death might not have been the issue that it proved to be. And if it had not been the issue, it is conceivable that this action-reaction cycle might not have occurred.

Now, I only stress that because that is conjectural. It is quite possible that it would have unfolded in precisely the same way, but I would hope that the administration would recognize that there are international legal frameworks, one of which is the Law of the Sea Convention, which have direct relevance to issues like Libya.

CONSULTATION VERSUS NOTIFICATION

Let me turn, though, to one of your assertions that I think is very central to the discussion today. On page 16 you state that Congress had ample opportunity to convey its views prior to irrevocable action.

Are you asserting to this committee if the group of members that were brought to the White House 3 hours before the bombing attack was to occur; but long after the planes had been sent, and had objection, that you believe the President would have changed his mind and ordered the strike called off?

Mr. SOFAER. No, that is not what I said. I just said that there was an opportunity for them to assert their views.

Mr. LEACH. Well, that, in effect, I think one can consider notification.

I would go personally in terms of Presidential handling of this situation, since you have acknowledged it is a notification, not a consultation, my own sense is it was designed to sell the——

Mr. SOFAER. I did not—did I acknowledge anything? I did not, Congressman. I did not——

Mr. LEACH. Well, I think you acknowledged that the President would not have changed his mind.

Mr. SOFAER. I did not say that. I said that the Congressmen invited in that consultation——

Mr. LEACH. Yes.

Mr. SOFAER [continuing]. Because it was a consultation and not a mere notification, had an opportunity to state their views. And no Congressman——

Mr. LEACH. And then I ask the question, do you believe the President would have been likely to change his mind at that point in time?

Mr. SOFAER. Well, I do not know. I think the President would have given appropriate weight, in his judgment, as the elected President of the United States, to the views of the leaders of our Congress.

Mr. LEACH. Well, to continue——

Mr. SOFAER. I know he would have.

EARLY CONGRESSIONAL CONSULTATION ON POLICY OPTIONS

Mr. LEACH [continuing]. It is my own perspective that it stretches credibility to assume that there would have been much chance that a raid could conceivably have been called off, but Congress was placed in a yes-or-no situation of which even a no would have been unlikely to have been well received.

Therefore, that particular consultation not only had elements of, with respect to the War Powers Act, of irrelevancy, but it had elements of danger. And this Member, frankly, would have suggested that that consultation not occur, and that instead, far earlier than that on basic policy frameworks, not tactical, Members' of Congress advice would have been sought, as apparently were those of foreign leaders, and that Congress as an equal branch of the Government under the Constitution, let alone having a role under the law of the United States, particularly the War Powers Act, should have been treated with a greater degree of respect.

And I stress respect, because the attitudinal assumption that Congress does not want to be involved, is one that relates to the issue of how this administration wants to proceed. I, frankly, think it was a mistake.

CAUTION ADVISED IN LAUNCHING ANTITERRORIST ACTIONS

Finally, I would like to point out that we are talking about something more than just a response to terrorism. We all know as we look at the history of this century that a particular assassination, that of probably a character of even more minor dimensions than Qadhafi, an Archduke, led to a very senseless killing of millions of people and the unfolding of the First World War. And it is not at all inconceivable that this particular antiterrorist act will lead to a counteract which will then lead to another counteract which could then lead to something that could be far more than a terrorist or antiterrorist action. And that what we could be seeing here is the beginning of the types of activities that lead to war itself.

And, yes, I would check the War Powers Act, because I think there are some obligations of the administration that were not very well complied with.

There are stories, and I do not know if they are true or not—Perhaps they are apochryphal—that Lloyds of London might have been notified before the United States Congress with regard to the Nicaraguan mining. The notion that an uncooperative leader of a foreign state would be notified before the Congress, I find very, very unseemly and very possibly stretching of the law itself.

But, finally, let me just conclude by saying, this hearing is about the law and what it appears to reveal is a set of attitudes, attitudes that reflect how the law is to be administered. And I think there is an aspect of that issue that should be understood in the administration.

Thank you, Mr. Chairman.

Chairman FASCELL. Judge, thank you very much, and we appreciate the time and the effort and the attention that you have given to this matter. We intend to submit additional questions and hope to have your answers as soon as possible. We appreciate very much the time and attention you have given us today.

Mr. SOFAER. It is a great pleasure to be with you, Mr. Chairman.

Chairman FASCELL. Our next witness who has been waiting so patiently is the Honorable J. Brian Atwood, director, National Democratic Institute; former Assistant Secretary of State for Congressional Relations; and former staff member of the other body, where he had considerable experience with the War Powers Resolution.

Mr. Atwood, we are delighted to have you here, and look forward to your testimony.

STATEMENT OF HON. J. BRIAN ATWOOD, DIRECTOR, NATIONAL DEMOCRATIC INSTITUTE

Mr. ATWOOD. Thank you very much, Mr. Chairman. I appreciate this opportunity to testify on something I have worked on a number of years.

I have a rather long statement, and it is getting late in the day, so I ask that it be submitted for the record, and I will attempt to condense my testimony and abbreviate.

I hear no objections, so I will go on.

Mr. Chairman, I had not expected, as a nonlawyer, to refute the words of a Judge; however, some comments made by Judge Sofaer certainly deserve to be refuted. I would like, therefore, to start my testimony with a comment on his explanation that the transiting of the Gulf of Sidra a few weeks ago was part of a routine program, which was begun in the Carter administration, to exercise our global freedom of navigation rights.

Now, he would have us believe that the Reagan administration is interested in strengthening the international legal regime with respect to the transit of areas such as the Gulf of Sidra.

The key question here is one of intent. What was the intent of the administration in transiting the Gulf of Sidra? It seems a bit disingenuous to me that an administration that has opposed the Law of the Seas Treaty—which, by the way, is supported by the

60-907 O - 86 - 3

U.S. Navy as a means of clarifying the right of transit through certain international straits—and an administration which mined the harbors of a nation with which we are not at war, would suggest that the intent was to strengthen international law in this area.

In fact, I tend to believe the comments of anonymous administration spokesmen who were quoted in a number of newspapers as saying that they knew in advance that the effort was in fact to try to bloody Qadhafi's nose.

I also have not heard, for a long time, since prior to the adoption of the War Powers Resolution in 1973, the argument that by appropriating money and passing authorization bills that the Congress, in fact, is giving authority to the President to use United States forces in the manner they were used over Libya a few weeks ago.

I would remind this committee and Judge Sofaer that when the Rapid Deployment Force was first authorized in 1981, the War Powers Resolution was reaffirmed by Congress. In an amendment by Senator Exon, it was asserted that the War Powers Resolution applied even to the use of the Rapid Deployment Force.

With respect to comments that Congressman Hyde made with respect to declarations of war, I would remind this committee that in 1786, when the Constitution was adopted, in the previous century, wars had been declared worldwide only five times.

The Constitutional convention debate makes it clear that the founders were really interested in a provision which, in effect, would give Congress the right to authorize war, not necessarily to declare war in a formal sense as is prescribed under international law. That formalized action was rare even in 1786

Mr. Chairman, you have asked me to address the administration's record of compliance with the War Powers Resolution; and, to do so, it is first necessary to cut through the sweeping claim of past and present administrations that the War Powers Resolution is unconstitutional.

This claim is, in my view, put forth by the executive more to obscure compliance issues than to shed light on the intent of those who drafted the Constitution.

The real issues here, Mr. Chairman, are not the provisions which do raise constitutional issues, the cutoff provisions in section 5, but the compliance of this administration and previous administrations with section 3 and section 4—the consultation and reporting provisions. These provisions have not been challenged by administrations as being unconstitutional.

In fact, it is with the knowledge that these provisions have the full weight of law that succeeding administrations have constructed elaborate rationalizations to avoid their force. In doing so, they have, in my view, distorted the clear language of the statute, taken advantage of institutional disorganization in this body, and perverted the original intent of Congress when it passed the War Powers Resolution.

It is first important to understand what motivates any administration to avoid the consultation and reporting requirements of the resolution. And here I draw on personal experience.

The motivations fall into three broad categories: legal, policy, and security.

In the legal area, there is a strong fear that any concession to Congress on war powers will create a precedent which could erode Presidential powers. Administrations take seriously Corwin's line that the Constitution is an invitation to struggle, and nowhere is the executive more protective of its claim to power than in the field of foreign relations and national security.

In the case of the War Powers Resolution, the concern relates primarily to the triggering of the automatic cutoff provision in section 5. While this is challenged as unconstitutional, administration lawyers neither want to force a court test, nor do they wish to see a clash of political will between the branches. Thus, the argument goes, section 4(a)(1), which is the only reporting clause that triggers the cutoff, must never be cited explicitly unless the military operation has already been terminated.

Furthermore, since the conditions for consultation under section 3 are identical to those in section 4(a)(1), administration lawyers see the consultation provision as a slippery slope. If its conditions require compliance, then, by implication, the President will have to report under 4(a)(1), thus triggering the section 5 cutoff provision.

In policy terms, the need to consult with Congress usually is seen as a threat to a careful balancing of competing positions within the administration.

Finally, there are legitimate security concerns over expanding the number of people who know about a sensitive operation. These legitimate concerns turn into frenzied worry when the people to be informed happen to be Members of Congress.

With the exception of the President and Vice President, most executive branch employees have never run for office. They see politics as a profession which requires openness and freewheeling, not the characteristics of a careful bureaucrat. It is therefore much easier to imagine the security risk when Members of Congress are involved. This security concern has in recent years become the most cited excuse for failing to consult. And I will return to this later in my testimony.

These legal, policy and security motivations are very powerful within the executive branch and can be brought to bear even on a President who does not wish to trifle with the law and who wants good relations with Congress.

Whatever attitudes prevail, executive branch lawyers must play a central role because no President wants to stand accused either of violating the law or of allowing the powers of the Presidency to erode.

In each case wherein a choice is made not to consult under section 3 of the resolution or to report under 4(a)(1) a legal rationale is developed by the legal advisor's office, often in coordination with lawyers from the Defense Department, Justice, and the White, House.

Over the years, these rationales, few of which are passed on in any detail to the Congress, but all of which are preserved as the internal case history for the lawyers of succeeding administrations, have grown more and more imaginative.

I was told, for example, that in the planning stages for the 1981 transit of the Gulf of Sidra, a probability-of-conflict rationale was developed.

If the Pentagon determined that the likelihood of combat activity was 50 percent or above, then, and only then, would Congress have to be consulted in advance.

Despite the fact that, according to participants in the planning, the primary purpose of the mission was to provoke an attack, the 50-percent probability-of-conflict threshold was never reached, and Congress was not consulted in advance.

A second, and potentially more dangerous form of legal advice designed to avoid congressional consultation relates to rules of engagement, also known as ROE at the Pentagon. These are the standing orders issued to field commanders by the Joint Chiefs.

Most military forces overseas operate under peacetime rules of engagement, a key aspect of which is that one does not engage in combat activity and does not fire unless fired upon.

In at least two situations of which I am aware, changes were not made in peacetime rules of engagement because to do so would contradict the public and congressional description of the mission for which the forces were deployed. I refer to the 1981 transit of the Gulf of Sidra and to the peacekeeping force in Lebanon in 1982 and 1983.

In the former case, I was told that the Navy requested a change in the ROE to allow its pilots to fire on Libyan planes when they locked on with their radars, thus indicating they were targeting United States aircraft. This request was dropped when it was pointed out that a change would demonstrate that the administration knew in advance that hostilities were clearly indicated by the circumstances. This would have rendered the probability-of-conflict construct unusable and would have made a failure to consult with Congress difficult to explain.

The Lebanon case came under close public scrutiny as a result of the October 23, 1983, terrorist attack on our Beirut airport barracks and the death of 241 marines.

The Long Commission, which investigated the circumstances of that tragedy, was highly critical of the chain of command for its failure to adjust the rules of engagement to accommodate to a more hostile environment.

The commission observed in its report that the marines were under orders not to engage in combat and that they were to use normal peacetime rules of engagement. The report went on to say that for any ROE to be effective, they should incorporate definitions of hostile intent and hostile action which correspond to the realities of the environment in which they are to be implemented.

I do not believe it is a coincidence that during this same late August to October 1983 period the administration was engaged in a major dispute with Congress, arguing that United States forces in Lebanon were not involved in hostilities as defined by the War Powers Resolution. Yet, the facts are otherwise.

On August 29, 1983, two marines were killed and 14 wounded when they received and returned hostile fire.

On September 1, we augmented our forces with 2,000 additional marines, fighter planes, and artillery.

On September 12, the marines were authorized to call in airstrikes.

And on September 19, we used naval forces to shell the Suk el Gharb area in support of the Lebanese Army, an action cited by the Long Commission as having changed the fundamental nature of our involvement.

In spite of all this hostile action, no report was submitted under section 4(a)(1), and the rules of engagement continued to be normal peacetime rules of engagement.

I agree with the Long Commission that the failure to change the rules of engagment was a contributing factor in the tragedy of October 23, 1983, and the deaths of 241 marines.

And I believe there is a very strong circumstantial case that these rules were not changed because of the administration's desire to avoid reporting to Congress under section 4(a)(1) of the War Powers Resolution, an action which would have triggered the 90-day cut-off provision.

Mr. Chairman, I believe these illustrations demonstrate my point about the powerful motivations which affect executive branch behavior. I would like briefly now to examine the merit of the legal rationalizations employed to avoid consulting Congress in advance.

The language of the resolution seems clear on its face. Congress is to be consulted in every possible instance and before introducing U.S. Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.

This language came directly from the House bill, as the chairman knows, and if it is not clear enough on its face, a lawyer with good intentions would refer to the House committee report to discover Congress' intent in the only relevant legislative history.

That report states that the use of the word "every" reflects the committee's belief that such consultation prior to the commitment of Armed Forces should be inclusive.

The report then carefully restricts the word "possible" by explaining that it was meant to describe a situation so dire—in other words—a hostile missile attack under way, and require such instantaneous action that no prior consultation will be possible.

Against the backdrop of this legislative history, I ask the committee to consider the administration's compliance in the case of the recent attack on Libya. A full week before the air strike the administration was confirming newspaper stories to the effect that U.S. forces were being brought into position for a possible attack.

Ambassador Walters made the rounds of NATO allies advising them of our plans and requesting assistance. I happened to have been in London just after his visit and read a news story based on a leak which was promptly denied, to the effect that Prime Minister Thatcher had given permission to use British bases to launch an attack on Libya.

All of this activity was going on and yet Members of Congress were not called in for consultations until 3 hours before the strike. Needless to say, that is not compliance with section 3.

The issue of security has been used time and again to justify not consulting Congress. Even if this argument is not grounded in the law, frankly, it remains politically plausible—which, incidentally, seems to be more important to Judge Sofaer—principally because of Congress' refusal to take itself seriously in the war powers area.

Deprecating comments by members about Congress' inability to keep a secret, combined with Congress' failure to organize itself for the consultation process, as it has done so well in the intelligence area, provide the executive branch with a very easy political, if not legal, case.

Now, we are confronted with what is called a new type of a war, a war on terrorism, and the security argument seems even more valid. Flexibility is demanded and special requirements are cited as necessary to meet the challenge of individuals who operate in the shadows, while being harbored and often supported by sovereign states.

These demands are very real and they require a new approach by Congress. But we should not confuse matters by alluding to issues that fall under the purview of the Intelligence Oversight Act.

We are here to discuss the War Powers Resolution which deals exclusively with the introduction of uniformed U.S. Armed Forces into hostilities or into situations where hostilities may be imminent. When we take these steps, we do not operate in the shadows; we operate under the glare of international scrutiny with all of the risks inherent in using overt force against another nation.

There are clearly occasions when force must be used to deal with those who harbor and support terrorists. This was the case President Reagan made in justifying his strike against Libya, and it is a strong one.

But neither the strength of the President's case nor the popularity of his action lessened the potential risks. We all hope it turns out well, but at the end of the day, whether it turns out well or ill, it was a fateful decision taken by a single person without the advice and counsel of Congress. And it creates a new precedent as a policy option for dealing with the terrorism program.

I suggest that the decisions we make in dealing with terrorism require consideration by the most experienced minds our Government offers. The complexity of the problem is so great and the ramifications so potentially fateful that the utmost care is needed to be sure we have carefully considered all options and understand the advantages and disadvantages of introducing U.S. forces.

What then is the relevance of the War Powers Resolution?

I believe that a constructive role for Congress as an institution is even more important in this age of terrorism than it was when the resolution was passed, and it is my belief that the consultation provision of the resolution provides the opportunity for Congress to perform the role it was intended to play.

Congress is not well-equipped to offer advice, manage or even terminate an involvement in hostilities once they have begun. Congress' constitutional war powers have predominate force prior to the introduction of the troops. That is why the Congress must insist on the full implementation of the consultation requirement under section 3; and that is why Congress must organize itself to perform its function well and in a manner that would inspire the confidence of the public and the executive branch.

The failure of the executive branch to engage in meaningful consultations in the Libyan situation has once again renewed interest

in the creation of a special leadership committee which would be designated as the congressional body to be consulted.

Senator Robert Byrd is now sponsoring a new proposal to designate the leadership of both Houses and the chairmen and ranking members of the Foreign Affairs, Armed Services, and Intelligence Committees to what he calls a consultative body.

I urge this committee to support this initiative as a way of preventing the further erosion of Congress' war powers and as a device for improving the decision process in this age of terrorism.

I do have one additional suggestion, however: this leadership committee must organize itself to perform an active, as opposed to a passive, role. The mere designation of a consultative body will not guarantee that the executive branch will choose to consult it. This designated special committee must be empowered to receive information on a routine basis and to request consultations when a majority of its members, not just the executive branch, deems it appropriate.

It is very important that such a committee be organized to create an environment and a sense of professionalism that is equal to the awesome task it undertakes and which inspires public confidence.

And I have several suggestions in my written statement as to how that could be done.

This special committee must confront the security issue head on. Congress cannot permit a President to usurp its constitutional position on these grounds. So long as Congress fails to organize itself to consult on sensitive matters, it is susceptible to the legitimate charge that 535 individuals and thousands of staff cannot be trusted and should not be consulted.

But can this be said about a committee of 18 members, the number that would be included in Senator Byrd's proposal?

Who in the executive branch is prepared to argue that the Speaker, or the majority and minority leaders of the two Houses, or the chairmen and ranking members of the Foreign Affairs, Armed Services, and Intelligence Committees cannot be trusted?

If this is true, they should warn us now, because these Members already receive the most sensitive information available in our Government.

As for the security problem inherent in adding persons who have knowledge of sensitive operations, some information received last September should put this issue in context. In a fully coordinated executive branch response to a series of questions put to the general counsel of DOD by Senator Eagleton, the administration reported that the number of military personnel given a security briefing on some portion of the Iran rescue mission was less than 2,000, including less than 100 nonmilitary personnel.

The response went on to volunteer that the number of decision-makers and planners generally involved in sensitive operations generally varies and could range from 75 upward.

This response did not, of course, include the non-Americans who must be consulted when we use foreign bases, as in the case of the Libyan air strike.

How many British Government officials were aware of our Libyan plans before the attack?

Ten, twenty, one hundred?

It hardly seems justifiable in the context of these combined numbers to exclude 18 Members of Congress who have a clear constitutional mandate.

On the positive side, these 18 members bring a wealth of experience and a different perspective to the decision process. The other day I added the years of experience of the Members who would be designated under Senator Byrd's proposal. This group has a combined total of 415 years of experience at the national level of our Government. That comes out to an average of 20 years per Member. And I have not even included military service.

The participation of a group of this quality, far from being a political threat to the President, could provide strong bipartisan support for whatever action is decided upon. This was one of the key reasons the Constitution prescribed the sharing of the war power. It is time to organize the Congress to make this sharing a reality.

I want to conclude, Mr. Chairman, with some very brief observations about governmental systems and the relationship of this war powers issue to the functioning of our very unique form of democracy.

In my work in democratic development for the National Democratic Institute, I have been reminded that democracy is always a fragile system. Those of us who are privileged to be citizens in democratic states must pay attention not only to the preservation of our individual liberties but also to the strength of our institutions, to the smooth functioning of the mechanisms of government, and, most importantly, to the rule of law.

When we do not, when we become arbitrary and capricious, we contribute to the anarchy to which our nondemocratic opponents wish us to succumb.

Ours is a system which achieves accountability through checks and balances. It is a vastly different system than that of a parliamentary democracy where accountability rests within the party structure and is preserved essentially by the rules of a single institution.

In such a system, failures of judgment in matters of war and peace are quickly dealt with by resignation. If they are not, governments can and do fall.

We have no such system of immediate, ex post facto accountability here. This is why our forefathers put so much stress on collective decisionmaking and shared war powers prior to the commitment of military forces.

The Reagan administration, to its credit, has placed great emphasis on the development of democracy throughout the world. Yet, it is my belief that in this particular area the administration has done serious damage to our own democracy. It has done this by refusing to respect fully the prerogatives of another, separate but equal governmental institution, by inhibiting the smooth functioning of the mechanisms of government, and by weakening the rule of law through a process of obfuscation and rationalization.

The current administration has gone much further than any of the previous ones in rationalizing away its statutory responsibility to consult with and report to Congress under the War Powers Resolution. In the process, the vitally important concepts of collective

decisionmaking and shared powers have been dealt a grievous blow in our most important area of governance.

Mr. Chairman, it is my view that only forceful and decisive action by Congress will now preserve the original constitutional design and the intent of the War Powers Resolution.

In this dangerous era of terrorism and the nuclear threat, we cannot afford to leave the security of our Nation and the world to the exclusive judgment of a single person whose accountability is limited.

As the late, distinguished constitutional scholar Alexander Bickel once observed:

> Singly, either the President or Congress can fall into bad errors, of commission or omission. So they can together too, but that is somewhat less likely, and in any event, together they are all we've got.

Thank you, Mr. Chairman.

Chairman FASCELL. Thank you very much, Mr. Atwood, for your excellent statement.

[Mr. Atwood's prepared statement follows:]

Prepared Statement of J. Brian Atwood, Director, National Democratic Institute

Thank you, Mr. Chairman, for the opportunity to testify before this committee on the War Powers Resolution. I have worked on this issue in both the Congress and the Executive Branch. I hope that my experiences will be useful to you as you review the current relevance of the Resolution in this age of new challenges to our national security.

The views I express here today are exclusively my own and do not necessarily reflect the views of the National Democratic Institute or its Board of Directors.

Let me first congratulate you, Mr. Chairman, for opening this important subject for congressional and public consideration. It is not easy to raise legal and constitutional questions at a time when the public is rallying behind a military action taken by the President. You have recognized, however, that we cannot set aside the constitution and the rule of law even when an initiative by the Executive Branch seems highly popular.

It has been asserted that the War Powers Resolution, enacted in 1973, is no longer applicable to the security problems our nation faces today. Legislation has been introduced by the Majority Leader of the Senate to eliminate the consultation provision in cases involving a military response to terrorism. Former President Richard Nixon, over whose veto the law was enacted, wrote recently in the Washington Times that the Resolution tied the President's hands in responding to this new threat.

I assume you have invited me here today because I have a different view.

I hold the view that the War Powers Resolution of 1973 was enacted to clarify and reassert the constitutional powers of Congress, and to bring its influence and deliberation back into the most fateful decisions our nation can make. While I was an advocate of the Senate's legislative approach in 1973, I hold the view that the Resolution, particularly the consultation provision, provides a practical mechanism for improving the decision process and for ensuring congressional involvement before American forces are committed to battle. Finally, I believe that this practical mechanism is even more necessary in this threatening, modern world--particularly if the law is carried out by both branches effectively in a good faith effort to make the process work.

You have asked me to address the Administration's record of compliance with the Resolution. To do so, it is first necessary to cut through the sweeping claim of past and present Administrations that the War Powers Resolution is unconstitutional. This claim is, in my view, put forth by the Executive more to obscure compliance issues than to shed light on the intent of those who drafted the Constitution.

Not one of the provisions cited by succeeding administrations as impinging on the legitimate powers of the Commander and Chief has been activated since the War Powers Resolution came into effect in 1973. It is therefore nothing more than a canard to continue to focus the public's attention on the automatic cut-off provision or the concurrent-resolution veto in Section 5. These provisions do raise constitutional issues, but they have never been tested, either in the courts or in a situational setting. Furthermore, even if they were found unconstitutional, other provisions of the Resolution would continue to be operative under the separability clause contained in Section 9.

These other provisions--the requirements in Section 3 to consult Congress prior to the introduction of U. S. forces into hostilities and in Section 4 to report to Congress accurately on their deployment-- have not raised constitutional issues and no Adminstration has challenged them as being unconstitutional. Indeed, President Nixon's veto message, for the most part highly critical of the Resolution as an imposition on his powers, went so far as to suggest that the consultation and reporting provisions might improve the information flow between the branches. In 1977, the State Department Legal Advisor, amplifying on this long-accepted and limited bow to Congressional prerogative, made the following statement before the Senate Foreign Relations Committee: "By establishing the consultation and reporting requirements contained in Sections 3 and 4 of the War Powers Resolution, the Congress took a useful and desirable step toward reducing information and communications obstacles which have impeded coordination in the past."

So let us dispense with the canards and examine the compliance question by focusing on these clearly constitutional provisions of the law.

It is with the knowledge that these provisions have the full weight of law, that succeeding Administrations have constructed elaborate rationalizations to avoid their force. In doing so, they have in my view distorted the clear language of the statute, taken advantage of institutional disorganization in this body and perverted the original intent of Congress when it passed the War Powers Resolution. In the process, the imbalance which characterized the relationship between the branches in 1973 when the Resolution was enacted continues to place Congress in the role of observer rather than player. It is furthermore my view that a continuation of this imbalance will seriously impair our government's ability to maintain public confidence in dealing with the highly complex and serious threat of terrorism.

It is first important to understand what motivates any Administration to avoid the consultation and reporting requirements of the Resolution. Here I draw on personal experience and a number of interviews with key Executive Branch participants after I left that branch of government. The motivations fall into three broad categories: legal, policy and security.

In the legal area, there is a strong fear that any concession to Congress on war powers will create a precedent which could erode Presidential powers. Administrations take seriously Corwin's line that the Constitution is "an invitation to struggle," and nowhere is the Executive more protective of its claim to power than in the field of foreign relations and national security.

In the case of the War Powers Resolution, the concern relates primarily to the triggering of the automatic cut-off provision in Section 5. While this is challenged as unconstitutional, Administration lawyers neither want to force a court test, nor do they wish to see a clash of political will between the branches. Thus, the argument goes, Section 4(a)(1), the only reporting clause that triggers the cut-off, must never be cited explicitly unless the military operation has already been terminated. (Parenthetically, it has been cited only once, in the Mayaguez incident in May 1975.) Furthermore, since the conditions for consultation under Section 3 are identical to those in Section 4(a)(1), Administration lawyers see the consultation provision as a slippery slope -- if its conditions require compliance, then, by implication, the President will have to report under 4(a)(1), thus triggering the Section 5 cut-off provision.

In policy terms, the need to consult with Congress usually is seen as a threat to a careful balancing of competing positions within the Administration. In most cases, options which do not require the use of force are quite appealing and the final decision is a difficult one. Bringing in individuals with a more political perspective, individuals who do not work for the President and will be less impressed by the fact that he has already chosen an option, is seen as a threat to the delicate balance. It is also seen as a potential political threat to the President if the options supported by key members of Congress are rejected.

Finally, there are legitimate security concerns over expanding the number of people who know about a sensitive operation. These legitimate concerns are transformed into frenzied worry when the people to be

informed happen to be Members of Congress. With the exception of the President and Vice President, most Executive Branch employees have never run for office. They see politics as a profession which requires openness and free-wheeling, not the characteristics of a careful bureaucrat. It is therefore much easier to imagine the security risk when Members of Congress are involved. This security concern has in recent years become the most-cited excuse for failing to consult; I will return to this problem, and a possible solution, later in my testimony.

These legal, policy and security motivations are very powerful within the Executive Branch and can be brought to bear even on a President who does not wish to trifle with the law and who wants good relations with Congress.

Whatever attitudes prevail, Executive Branch lawyers must play a central role because no President wants to stand accused either of violating the law or of allowing the powers of the Presidency to erode. In each case wherein a choice is made not to consult under Section 3 of the Resolution or to report under 4(a)(1) a legal rationale is developed by the Legal Advisor's office, often in coordination with lawyers from the Defense Department, Justice Department, and the White House. Over the years these rationales, few of which are passed on in any detail to the Congress, but all of which are preserved as the internal case history for the lawyers of succeeding administrations, have grown more and more imaginative.

I was told, for example, that in the planning stages for the 1981 transit of the Gulf of Sidra, a "probability-of-conflict" rationale was developed. If the Pentagon determined that the likelihood of combat activity was 50 percent or above, then, and only then, would Congress have to be consulted in advance. Despite the fact that, according to participants in the planning, the primary purpose of the mission was to provoke an attack, the 50 percent probability-of-conflict threshhold was never reached--and Congress was not consulted in advance.

A second, and potentially more dangerous form of legal advice designed to avoid congressional consultation relates to "rules of engagement" (known by the acronym ROE). These are the standing orders issued to our field commanders by the Joint Chiefs of Staff. Most military forces overseas operate under peacetime rules of engagement, a key aspect of which is that one does not engage in combat activity and does not fire unless fired upon. In at least two situations of which I am aware, changes were not made in peacetime rules of engagement because to do so would contradict the public and congressional description of the mission for which the forces were deployed. I refer to the 1981 transit of the Gulf of Sidra and to the "peacekeeping" force in Lebanon in 1982 and 1983.

In the former case, I was told that the Navy requested a change in the ROE to allow its pilots to fire on Libyan planes when they "locked on" with their radars, thus indicating they were targetting U.S. aircraft. This request was dropped when it was pointed out that such a change would demonstrate the Administration knew in advance that hostilitites were "clearly indicated by the circumstances." This would have rendered the probability-of-conflict construct unusable and would have made a failure to consult with Congress difficult to explain.

The Lebanon case came under close public scrutiny as a result of the October 23, 1983 terrorist attack on our Beirut airport barracks and the death of 241 Marines. The Long Commission, which investigated the circumstances of that tragedy, was highly critical of the chain of command for its failure to adjust the rules of engagement to accomodate to a more hostile environment.

The Commission observed in its report that the Marines were under orders "not to engage in combat" and that they were to use "normal...peacetime ROE." The report went on to say that "for any ROE to be effective, they should incorporate definitions of hostile intent and hostile action which correspond to the realities of the environment in which they are to be implemented."

I do not believe it is a coincidence that during this same late August-to-October-1983 period the Administration was engaged in a major dispute with Congress, arguing that U.S. forces in Lebanon were not involved in hostilities as defined by the War Powers Resolution. Yet the facts are otherwise:

-- On August 29, 1983, two Marines were killed and 14 wounded when they received and returned hostile fire.

-- On September 1, we augmented our forces with 2,000 additional Marines, fighter planes, and artillery.

-- On September 12, the Marines were authorized to call in airstrikes.

-- On September 19, we used naval forces to shell the Suk el Gharb area in support of the Lebanese army, an action cited by the Long Commission as having changed the fundamental nature of our involvement.

In spite of all this hostile action, no report was submitted under Section 4(a)(1), and the rules of engagement continued to be "normal peacetime ROE." I agree with the Long Commission that the failure to change the ROE was a contributing factor in the tragedy of October 23, 1983 and the deaths of 241 Marines. And I believe there is a very strong circumstantial case that these rules were not changed because of the Administration's desire to avoid reporting to Congress under Section 4(a)(1) of the War Powers Resolution, an action which would have triggered the 90-day cut-off provision.

Mr. Chairman, I believe these illustrations demonstrate my point about the powerful motivations which effect Executive Branch behavior. I would like briefly now to examine the merit of the legal rationalizations employed to avoid consulting Congress in advance and reporting accurately under 4(a)(1).

The language of the Resolution seems clear on its face. Congress is to be consulted "in every possible instance" and "<u>before</u> introducing U. S. Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances." This language came directly from the House bill and, if it is not clear enough on its face, a lawyer with good intentions would refer to the House Committee report to discover Congress' intent in the only relevant legislative history.

That report states that "the use of the word `every' reflects the Committee's belief that such consultation prior to the commitment of armed forces should be inclusive ... in other words, it should apply in extraordinary and emergency circumstances ..." The report then carefully restricts the word "possible" by explaining that it was meant to describe a situation "so dire, [in other words a] hostile missile attack underway, and require such instantaneous action that no prior consultation will be possible."

Against the backdrop of this legislative history, I ask the Committee to consider the Administration's compliance in the case of the recent attack on Libya. A full week before the air strike the Administration was confirming newspaper stories to the effect that U.S. forces were being brought into position for a possible attack. Ambassador Walters made the rounds of NATO allies advising them of our plans and requesting assistance. I happened to have been in London just after his visit and read a news story -- based on a leak which was promptly denied -- to the effect that Prime Minister Thatcher had given permission to use British bases to launch an attack on Libya.

All of this activity was going on and yet Members of Congress were not called in for consultations until three hours before the strike, after the planes were on their way. This was not compliance with Section 3, nor was it consultation in the true sense of the word.

The Webster's dictionary definition of the word consult is "to seek the advice and counsel of ..." This does not mean notifying or informing three hours in advance of a mission already underway. Nor does it mean discussing a theoretical rescue mission of our hostages in Iran with a single member of Congress the afternoon of the day that mission was about to take place.

One of the most troublesome explanations ever given to Congress for a failure to consult was contained in a legal opinion dated May 9, 1980, by White Counsel to President Carter, Lloyd Cutler, relative to the Iran Rescue Mission. Mr. Cutler asserted that the president has an "inherent constitutional power to conduct this kind of rescue operation" and that this "includes the power to act before consulting Congress, if the President concludes ... that to do so would unreasonably endanger the success of the operation..." This assertion, boldly gives the President the discretion to eliminate any war powers role for Congress on the basis of his judgement that security considerations are overriding. Perhaps recognizing the inherent weakness of this overreaching opinion, Deputy Secretary of State Warren Christopher in a subsequent hearing before the Senate Foreign Relations Committee, testified that the Cutler claim was not meant to create a precedent, nor did the Administration intend that "the President is free to avoid consultations in any case where he desires secrecy."

The issue of security has been used time and again to justify not consulting Congress. Even if this argument is not grounded in the law, it

remains politically plausible principally because of Congress' refusal to take itself seriously in the war powers area. Deprecating comments by Members about Congress' inability to keep a secret, combined with Congress' failure to organize itself for the consultation process--as it has done so well in the intelligence area--provide the Executive Branch with an easy political, if not legal, case.

Now we are confronted with what is called a new type of a war -- a war on terrorism -- and the security argument seems even more valid. Flexibility is demanded and special requirements are cited as necessary to meet the challenge of individuals who operate in the shadows, while being harbored and often supported by sovereign states.

These demands are very real and they require a new and different approach by Congress. But we should not confuse matters by alluding to issues that fall under the purview of the Intelligence Oversight Act. We are here to discuss the War Powers Resolution which deals exclusively with the introduction of uniformed U.S. armed forces into hostilities or into situations where hostilities may be imminent. When we take these steps, we do not operate in the shadows; we operate under the glare of international scrutiny with all of the risks inherent in using overt force against another nation.

There are clearly occasions when force must be used to deal with those who harbor and support terrorists. This was the case President Reagan made in justifying his strike against Libya and it is a strong one. But neither the strength of the President's case nor the popularity of his action lessened the potential risks. We all hope it turns out well, but

at the end of the day, whether it turns out well or ill, it was a fateful decision taken by a single person without the advice and counsel of Congress. And it creates a new precedent as a policy option for dealing with the terrorism problem, the latest manifestation of an increasingly unstable world.

Secretary of State Alexander Haig in his confirmation hearing in 1981, called our attention to a "diffusion of power" in the world which was producing "instability in nation-state relationships and the general international order." Haig called for a more discriminating assessment of the precise threats to American interests grounded on an analysis of the rise of terrorism as a new tool of nation-state warmaking. He also pointed out that the danger of this development is enhanced by the proliferation of nuclear capability in the regions most subject to violent upheaval.

Former CIA Director William Colby in turn warned that military engagements could lead, "by an inexorable process of reactions" to a general war and to nuclear confrontation. He and others have observed that the use of force as a consistently applied policy option might only contribute to the "sum of anarchy."

I suggest that the decisions we make in dealing with terrorism require consideration by the most experienced minds our government offers. The complexity of the problem is so great and the ramifications so potentially fateful that the utmost care is needed to be sure we have carefully considered all options and understand the advantages and disadvantages of introducing U.S. forces into such situations.

What then is the relevance of the War Powers Resolution to this decision process? I believe that a constructive role for Congress as an institution is even more important in this age of terrorism than it was when the Resolution was passed 13 years ago. And it is my belief that the consultation provision of the Resolution provides the opportunity for Congress to perform the role it was intended to play.

Congress is not well-equipped to offer advice, manage or even terminate an involvement in hostilities once they have begun. Congress' constitutional war powers have predominate force prior to the introduction of the troops. That is why the Congress must insist on the full implementation of the consultation requirement under Section 3. And that is why Congress must organize itself to perform its function well and in a manner that would inspire the confidence of the public and the Executive Branch.

The failure of the Executive Branch to engage in meaningful consultations in the Libyan situation has once again renewed interest in the creation of a special leadership committee which would be designated as the congressional body to be consulted. This idea was first proposed by Senator Eagleton in a series of amendments to the War Powers Resolution put forward in 1975. I also commend a study by this committee under Congressman Hamilton, entitled "Executive-Legislative Consultation on Foreign Policy," in which a "Congressional Crisis Information Center" is discussed.

Senator Robert Byrd is now sponsoring a new proposal to designate the leadership of both Houses and the chairmen and ranking members of the foreign affairs, armed services and intelligence committees to what he calls a "consultative body."

I urge this committee to support this initiative as a way of preventing the further erosion of Congress' war powers and as a device for improving the decision process in this age of terrorism. I do have one additional suggestion, however -- this Leadership Committee must organize itself to perform an active as opposed to a passive role. The mere designation of a consultative body will not guarantee that the Executive Branch will choose to consult it. This designated special Committee must be empowered to receive information on a routine basis and to request consultations when a majority of its members -- not just the Executive Branch -- deems it appropriate.

It is very important that such a Committee be organized to create an environment and a sense of professionalism that is equal to the awesome task it undertakes and which inspires public confidence. With this in mind, I would recommend:

1. that fully-cleared, professional staff be designated from the three committees with expertise in war powers-type contingencies: foreign affairs, armed services, and intelligence;

2. that this Committee meet frequently in both the White House and the Capitol in an effort to establish a flow of information from the Executive Branch to the Congress about the world's hot spots. This would tend to diminish the significance (and the possible alarm) that would attach to any particular meeting; and

3. that strict security measures be adopted, including the designation of a secure meeting room, and a system of accountability be established similar to that utilized by the intelligence committees.

Quite clearly, the security issue must be confronted head on. Congress cannot permit a President to usurp its constitutional position on these grounds, as was suggested in the Cutler opinion. Yet, so long as Congress fails to organize itself to consult on sensitive matters, it is susceptible to the legitimate charge that 535 individuals and thousands of staff cannot be trusted and should not be consulted.

But can this be said about a committee of eighteen members, the number that would be included in Senator Byrd's proposal? Who in the Executive Branch is prepared to argue that the Speaker, or the Majority and Minority Leaders of the two Houses, or the Chairmen and ranking members of the foreign affairs, armed services and intelligence committees cannot be trusted? If this is true, they should warn us now, because these members already receive the most sensitive information available in our government.

As for the security problem inherent in adding persons who have knowledge of sensitive operations, some information received last September should put this issue in context. In a "fully coordinated" Executive Branch response to a series of questions put to the General Counsel of the Defense Department by Senator Eagleton, the Administration reported that the number of military personnel given a security briefing on some portion of the Iran Rescue Mission was "less than 2,000, including less than 100 non-military personnel." The response went on to volunteer that the number of decision-makers and planners generally involved in sensitive operations "varies and could range from 75 upward."

This response did not of course include the non-Americans who must be consulted when we use foreign bases, as in the case of the Libyan air strike. How many British government officials were aware of our Libyan plans before the attack? Ten, twenty, one hundred? It hardly seems justifiable in the context of these combined numbers to exclude 18 members of Congress who have a clear constitutional mandate.

On the positive side, these 18 members bring a wealth of experience and a different perspective to the decision process. The other day I added the years of experience of the members who would be designated under Senator Byrd's proposal. This group has a combined total of 415 years of experience at the national level of our government. That comes out to an average of 23 years per member, and I have not included military service.

But it is the quality of the advice and counsel this experienced group could provide that is most relevant to our battle against terrorism. Who in our government knows more about diplomacy and the terrorist threat than Dante Fascell and Bill Broomfield? Who knows more about the application of military power than Barry Goldwater, Sam Nunn and Les Aspin? Who knows more about the opportunites and dangers of covert action than Lee Hamilton, David Durenberger and Pat Leahy?

The participation of a group of this quality, far from being a political threat to the President, could provide strong bipartisan support for whatever action is decided upon. This was one of the key reasons the Constitution prescribed the sharing of the war power. It is time to organize the Congress to make this sharing a reality.

I want to conclude, Mr. Chairman, with some brief observations about governmental systems and the relationship of this war powers issue to the functioning of our unique form of democracy. In my work in democratic development for the National Democratic Institute, I have been reminded that democracy is always a fragile system. Those of us who are privileged to be citizens in democratic states must pay attention not only to the preservation of our individual liberties, but also to the strength of our institutions, to the smooth functioning of the mechanisms of government and, most importantly, to the rule of law. When we do not, when we become arbitrary and capricious, we contribute to the anarchy to which our non-democratic opponents wish us to succumb.

Ours is a system which achieves accountability through checks and balances. It is a vastly different system than that of a parliamentary democracy where accountability rests within the party structure and is preserved essentially by the rules of a single institution. In such a system, failures of judgement in matters of war and peace are quickly dealt with by resignation. If they are not, governments can and do fall.

We have no such system of immediate, ex post facto accountability. This is why our forefathers put so much stress on collective decision-making and shared war powers <u>prior</u> to the commitment of military force.

The Reagan Administration, to its credit, has placed great emphasis on the development of democracy throughout the world. Yet, it is my belief that in this particular area the Administration has done serious damage to our own democracy. It has done this by refusing to respect fully the prerogatives of another, separate-but-equal governmental institution, by inhibiting the smooth functioning of the mechanisms of government and by weakening the rule of law through a process of obfuscation and rationalization.

The current Administration has gone much further than any of the previous ones in rationalizing away its statutory responsiblity to consult with and report to Congress under the War Powers Resolution. In the process, the vitally important concepts of collective decision-making and shared powers have been dealt a grievous blow in our most important area of governance.

Mr. Chairman, it is my view that only forceful and decisive action by Congress will now preserve the original Constitutional design and the intent of the War Powers Resolution. In this dangerous era of terrorism and the nuclear threat, we cannot afford to leave the security of our nation and the world to the exclusive judgement of a single person whose accountability is limited. As the late, distinguished constitutional scholar Alexander Bickel once observed: "Singly, either the President or Congress can fall into bad errors, of commission or omission. So they can together too, but that is somewhat less likely, and in any event, together they are all we've got."

NEED FOR ADHERENCE TO CONSTITUTION AND STATUTORY LAW

Chairman FASCELL. Obviously, you have put a great deal of thought into this entire subject.

It is so important that I wish that every American had the opportunity to view it, think about it, and understand it, because it is the very essence of our democratic system.

It dealt directly with the constitutional questions and rule of law, and I think, frankly, those are all quite clear, although on any question of law, you can always have debate.

You can also have debate with respect to the facts of a particular situation. People tend to view things differently.

But I doubt that there is much that can be said to puncture the commonsense approach of the analysis that you have made as to why an administration—any administration—acts the way it does with respect to the application of either the Constitution or a statutory law, in this case, the War Powers Resolution.

Nonetheless, it is very important that we carry out the precepts of the Founding Fathers. I think the analysis that you made is extremely important. That is the reason that I emphasize my wish that everybody could read and understand what you said.

The issues that we are discussing here are the core of the entire problem, and are not simply a question of procedure or prerogatives. We are talking about the existence of a society and a process of government that has served us very well. And it is so easy, sometimes, to simply take some other course of action, than to worry about whether or not we have maintained our principles when we are under attack.

So, I appreciate you reminding us of that in the presentation of your testimony. You have really made a significant contribution to what we are considering here.

IMMINENT INVOLVEMENT IN HOSTILITIES CLEARLY INDICATED

On the question of facts, let's separate the constitutional question for a moment, and leave that out. Let's just look at the application of the War Powers Resolution in the first Gulf of Sidra test, in March.

We are agreed, I gather, that testing the principle of freedom of navigation in international waters is a legitimate issue.

Am I correct?

Mr. ATWOOD. That is right, Mr. Chairman. That would be legitimate.

Chairman FASCELL. And the question then was whether or not, under the circumstances, since all of the forces there were equipped for combat, whether or not a reasonable person would conclude that you might be introducing them into hostile action.

That is the question; that has to be determined by the facts. You have concluded, as I gather any reasonable person would, that the President was introducing the Armed Forces of the United States into an area where hostilities might be imminent. A question of fact. Am I correct?

Mr. ATWOOD. That is right, Mr. Chairman.

Chairman FASCELL. So, it becomes necessary to examine the facts that existed at that time, in order to determine whether or not the conclusion you reach is reaonable.

Is that correct?

Mr. ATWOOD. That's right.

Chairman FASCELL Now, you examined those facts, and have concluded that hostilities were imminent.

SIDRA ACTION WAS A PROVOCATION

Mr. ATWOOD. Well, let me go back a bit, because Judge Sofaer has talked about the Carter administration, with which I do have some intimate knowledge of intent.

It is clear that the Gulf of Sidra has been transited before by other administrations, including the Carter administration, but there, the Libyan Government and everyone in the region was forewarned that it was being done for peaceful purposes. It seems clear to me, in the planning process for this particular Gulf of Sidra transit, in 1981, and the one that took place a month ago, that the intention of the administration was to provoke, that it was not primarily to reestablish the international legal principle. That is the public position of the administration, and while one has to respect that position, it has to be contrasted with private motives.

Then the question becomes whether they believe that in transiting the Gulf of Sidra, they would come in contact with alien forces, and that hostilities would indeed occur.

And there I say it becomes a common sense question. The preparations for both of those transits indicate that they were preparing for combat activity that they knew was going to occur.

ANTICIPATION OF HOSTILITIES EVIDENT IN LIBYAN SITUATION

Chairman FASCELL. Well, it is evident that a third carrier force was added at that particular time when the previous exercises had been conducted with two.

I think one would have to conclude that, by introducing the third carrier, hostilities were likely. Therefore, the rest of us, not party to this information, should certainly conclude the same thing at a later date.

Mr. ATWOOD. Absolutely, Mr. Chairman.

It seems it is a question of judgment. If they really wanted, knowing what they knew in advance of that exercise to follow the letter and the spirit of the War Powers Resolution, it seems to me they would have consulted with Congress in advance.

EXECUTIVE ATTITUDE TOWARD WAR POWERS COMPLIANCE

Chairman FASCELL. Well, you see, I agree with that, but, of course, I supposed I am biased. I think it is so easy to comply with the intent of the resolution, I cannot imagine why anybody worked so hard not to comply, and worked so hard to get legal opinions to say it is unconstitutional, or that it unnecessarily impinges on the power of the President, when it is obvious that it does not. The President does what he wants anyway. You cannot stop a President

of the United States from doing anything, whether he violates the law, or whether he violates the Constitution.

The only power that the Congress has, after the fact, is to either impeach a President, which is very difficult, if not impossible, or cut off his money so that he cannot conduct the war, which we have found is very, very difficult to do, once a war has started.

It is not the tendency of the Congress to back away from a Presidential decision after you have got the country committed. You have the honor and the integrity and manpower of the United States already committed, so it is not a very useful tool in dealing with the question.

And then one must raise, as you have, a fundamental question, which is, if the Founding Fathers did not want Congress in the loop of the decision that has to be made with respect to taking this country to war, then why in the world did they write the Constitution the way they wrote it.

And, of course, there is no answer except one; and that is the one you gave. You do not have to be a great constitutional lawyer to figure that one out. That, again, is just common sense.

So, the application of common sense to this problem seems to bring us to the question of why any administration does not want to deal with the War Powers Resolution, although it is the law of the land.

And I think those reasons need to be examined by the Congress. They need to be understood by the American people, because we have a problem here that needs to be discussed.

I want to thank you very much.

Mr. Gilman.

PROPOSAL FOR SPECIAL LEADERSHIP COMMITTEE

Mr. GILMAN. Thank you, Mr. Chairman.

I certainly want to thank Mr. Atwood for being patient and giving us such a detailed analysis of the War Powers Resolution and his recommendations.

With regard to that Special Leadership Committee, it seems that that could answer some of the problems that have been presented with regard to proper consultation and the broad feeling that there is a need for expansion and redefinition of the consultation process.

I have not examined the Lugar/Nunn proposal that closely. Does that proposal pretty much incorporate what you are recommending, Mr. Atwood?

Mr. ATWOOD. Yes, I believe it does, Mr. Gilman.

Senator Nunn is a cosponsor of the Byrd proposal, and that proposal, basically, is to create this special committee of 18 members that I referred to.

Mr. GILMAN. How do we take care of the major criticism of consultation—and that is the lack of security, the potential for leaking out an important initiative that may be under way?

Mr. ATWOOD. Well, as I have indicated, I think that Congress does itself great harm when it gives itself such low grades in this area, because both branches are guilty of these kinds of leaks.

But it seems to me that the Intelligence Committee processes work quite well. There have been very, very few leaks of any type.

In fact, last week, the papers were full of the chairman of the Intelligence Committee on the Senate side criticizing the administration for leaking information about the Ethiopian matter.

So, it happens on both sides; but there is a system of accountability built into the way the two intelligence committees operate, and I would assume that a Special Leadership Committee would have the same system of accountability.

And one more point: it seems to me that if we cannot trust these 18 members, of the 535, then we are already in trouble.

Congressman Fascell is the chairman of this committee, and already has access to the most sensitive information that this Government can offer.

So, it seems to me this should not be seen as a matter of trust.

POLICY ISSUES FOR CONSIDERATION BY SPECIAL LEADERSHIP COMMITTEE

Mr. GILMAN. And should there be this kind of broad policy discussion that we talked about earlier with regard to terrorism so that there is not a need for taking terrorism outside of the war powers proposal, out of the war powers restrictions?

Should there be the discussion of policy matters beforehand of whether or not we ought to be intercepting this type of aircraft, or that type of aircraft?

Do you think that that could resolve the problems of having some special consideration for terrorism under the War Powers Resolution?

Mr. ATWOOD. Absolutely.

I think that is perhaps one of the first things that such a special committee should do, in other words engage in an examination of all of the options that are before the executive branch in dealing with terrorism.

There would certainly be nothing inconsistent with the War Powers Resolution in doing this. Indeed, it is very consistent, to look at these options, and let the Congress provide its advice and counsel to the Executive. And, believe me, when you have people with the kinds of experience that Chairman Fascell has on matters of diplomacy and terrorism, and David Durenberger, and Lee Hamilton, the chairman of the Intelligence Committees; and Sam Nunn and Barry Goldwater on military matters, you are getting some of the best minds in our Government applied to a problem that the country as a whole faces. You also ensure yourself a better chance of getting bipartisan support for the options that are adopted in the end.

CLARIFICATION OF CONSULTATION PROVISION

Mr. GILMAN. Are there any other areas that you would see as a need for some immediate attention to tighten up the interpretation of the War Powers Resolution, so that we could overcome some of these objections?

Mr. ATWOOD. Well, I think one area that deserves some attention is the point I made earlier about the fact that the administration seems to think that if it consults under the conditions of section 3 then it is by implication triggering section 4(a)(1).

A proposal was made a few years ago that it be made clear that you must consult whether it is section 4(a)(1), 4(a)(2), or 4(a)(3).

Perhaps that clarification is needed, although I think that we have been placed in an extreme position here to have to suggest that it is. It seems to me that the legislative history would indicate that it is not needed, but the administration has taken certain steps, actions—not just this administration, but all administrations—that renders section 3 impotent. So it may well need clarification.

Mr. GILMAN. Well, we thank you for coming before our committee. There have been too few advocates of maintaining the structure of the War Powers Resolution, and we welcome your thoughts and analysis.

Thank you, Mr. Chairman.

Chairman FASCELL. Thank you very much, Brian.

The subcommittee stands adjourned, subject to the call of the Chair.

[The following summary of the preceding hearing was submitted at the request of Chairman Fascell:]

STATE-SPONSORED TERRORISM AND COMPLIANCE WITH
THE WAR POWERS RESOLUTION: SUMMARY (1)

On Tuesday, April 29, 1986, the House Committee on Foreign Affairs initiated the public phase of its inquiry into War Powers, Libya, and State-Sponsored Terrorism. Although the hearings follow in the wake of the March 24 exchange between U.S. and Libyan forces and the April 14 bombing strikes by U.S. air and naval forces on Libyan terrorist facilities, the Committee investigation has a broader focus: the relevance of the War Powers Resolution to acts of state-sponsored terrorism and insuring that the law's consultation and reporting features are not allowed to wither and die either by design or default.

Committee Chairman Dante B. Fascell opened the hearing as scheduled at 10:00 am and challenged the administration to arrive at a "sensible accommodation" with Congress so that the political branches can discharge their respective responsibilities in cases of hostilities that sooner or later may lead to war. Acknowledging that state-sponsored terrorism introduces a new circumstance in international life, the Chairman rejected the idea that it somehow fell outside the law or obviated the need to consult with Congress as the policymaking branch of the Federal Government.

The Chairman said that the manner by which the nation goes to war has both constitutional and statutory components. Regarding the latter, specifically the War Powers Resolution, he declared that the President is not at liberty to implement it or not as he sees fit. The obligation to faithfully execute the laws that is constitutionally imposed on him rejects any such freedom of choice.

Stating that he appreciated the need for flexibility in order to respond to threats to the national security and, in particular, threats

of this nature posed by state-sponsored terrorism, Chairman Fascell said that there were equally weighty matters to be considered by the Committee, Congress and the American people. Among these considerations were adherence to the rule of law and possible usurpation of power in the guise of protecting the right of free passage, self-defense, and safeguarding American lives and property.

He implored his colleagues to consider whether recent events and congressional responses to these events did not constitute an erosion of the overarching principles of the Constitution: the separation of powers and its ancillary system of checks and balances. He asked: "Do we want this?" "Do we want to modify the War Powers Resolution?" He urged that everyone at least become aware of what was ultimately at stake in the war powers debate.

Acknowledging that the War Powers Resolution was framed against the backdrop of more traditional forms of hostilities, Chairman Fascell rejected the notion that it was inapplicable to state-sponsored terrorism. "The War Powers Resolution still applies," he declared.

Mr. Abraham D. Sofaer, Legal Adviser, Department of State, was the lead-off witness in the first of two days of public hearings. Making passing references to the purpose behind the War Powers Resolution and current and past administrations constitutional reservations regarding it, Legal Adviser Sofaer turned to the law's key requirements: consultation, reporting and termination of the use of U.S. Armed Forces in hostilities.

Noting that the War Powers Resolution calls for consultations "before" and "after" the introduction of U.S. troops in specified situations, he observed that the nature of the consultations required was indefinite. Accordingly, it was Mr. Sofaer's opinion that the manner of complying

with the requirement was largely to be determined by the President. Moreover, since the law called for consultation "in every possible instance", he stated that "consultation in a particular case will depend on the prevailing circumstances."

Stating that purposes of consultation were three-fold -- inform Congress, determine whether Congress approves of a particular action or policy, and sound out Congress' views "especially where it may disagree with the policy" -- he stated that Congress was consulted by the Executive on the deployment of U.S. forces abroad both before and after passage of the War Powers Resolution. Past consultation, he asserted, was had whether the law required it or not. The nature and timing of consultation was affected by advance notice to and approval by Congress of a particular policy. Also, the form and substance of consultations depended upon the circumstances of each case. E.g. Peacekeeping activities in Egypt, the Vietnam evacuation, and the Tehran rescue mission.

After laying out the elements of the reporting requirement, the Legal Adviser declared that both Republican and Democratic Presidents have kept Congress informed even in cases where it was not legally required.

Mr. Sofaer's comments on the 60-90 day termination of U.S. involvement in hostilities if not reauthorized by Congress largely consisted of past and current administrations objections to its constitutionality and advisability.

Noting that the War Powers Resolution was the product of the Vietnam War and the Watergate scandals, Mr. Sofaer questioned its relevance to acts of individual and state-sponsored terrorism. He expressed administration doubts about its application to the use of anti-terrorist

units that are responding to murder and kidnapping and hijacking of commerical aircraft. Acknowledging that the law did not explicitly except activities by anti-terrorist units, he said that they were distinguishable from "forces equipped for combat" and their activities differed greatly from hostilities.

Clearly with the recent U.S.-Libyan activities in mind, the Legal Adviser expressed doubt concerning the law's application, among other things, to transit of warships into or through foreign territorial waters, transits of combat aircraft through foreign airspace, and military exercises in conformity with international law.

Even assuming the application of the War Powers Resolution to anti-terrorists units, he stated that compliance with the consultation requirements when using such units as a factual matter may not be possible because of the need for secrecy and dispatch.

Mr. Sofaer next traced the history of U.S. statements and actions challenging Libyan claims to the Gulf of Sidra. These and similar activities in respect to comparable claims by other countries were undertaken to support the right of free passage and deny realization of the unjustified claim by prescription. He declared that neither the conduct of naval maneuvers as such nor in the context of global freedom of the seas required consultation. "... those operations did not place U.S. forces into hostilities or into a situation in which imminent involvement in hostilities was 'clearly indicated by the circumstances'." Furthermore, "the threat of a possible hostile response is not sufficient to trigger the consultation requirement of" the law.

For purposes of reporting, Mr. Sofaer indicated the compliance was not required in the case of an isolated engagement such as that which transpired in the Gulf of Sidra; however, it might be "if U.S. forces withdrew from an area and subsequently returned for the purpose of undertaking further military action."

Whether legally required or not, he maintained that Congress was informed of the recent situation and was kept informed throughout the remainder of the naval exercise in the Gulf of Sidra.

In addition to the previously described situations, the Legal Adviser questioned the application of the War Powers Resolution to the April 14 operation against Libya that he described as self-defense activities to preempt and deter unlawful aggression by means of state-sponsored terrorism. After examining the relevance of consultation and reporting in such circumstances, he claimed that both requirements had been met.

Turning to the larger question of the need for congressional authorization to engage in hostilities, Mr. Sofaer noted that the President has independent powers in the area, and that these had been supplemented by statutory grants of authority such as a provision of the 1986 DOD Authorization Act that states the Government's duty to safeguard U.S. citizens against terrorism.

Legal Adviser Sofaer concluded by questioning the War Powers Resolution's application to the deployment of anti-terrorists units and deplored the tendency of the law to divert congressional leaders from issues of policy to issues of law.

Upon concluding his statement, Mr. Sofaer's final observation was challenged by Chairman Fascell and other Committee members who explained that in a nation devoted to the rule of law consideration of legal issues was at the heart of the process. Thereafter, the panel questioned him closely on a whole range of matters including differences between notification and consultation, who should be consulted, the limits of the anti-terrorist "exemption", the need and frequency of U.S. responses to unjustified claims to territorial waters, and possible and proposed amendatory remedial legislation. The members with obvious feeling and inspired eloquence let the Legal Adviser know that the administration would accomplish much more by actively consulting with Congress on any and all matters of actual or potential hostilities. In the words of Congressman Lantos: It is better to err on the side of over than under consultation.

The second and concluding witness in this the first day of public hearings was Mr. J. Brian Atwood, former Assistant Secretary of State for Congressional Relations and now Director, National Democratic Institute. Before making his formal remarks, Mr. Atwood challenged the Legal Adviser on a number of points. He described the Legal Adviser's characterization and explanation of U.S. presence in the Gulf of Sidra as "disengenuous". We went there to "bloody Qaddafi's nose", he said, and talk of maneuvers and protecting freedom of the seas was nothing more than a cover for that purpose.

Mr. Atwood, citing legislative history in connection with the authorization of a Rapid Deployment Force, challenged the statement that the use of anti-terrorist units fell outside the scope of the War Powers Resolution.

He endorsed Chairman Fascell's position that the Constitution cannot be set aside for any reason, including momentary popular support for a dramatic presidential initiative.

Mr. Atwood expressed whole-hearted support for the War Powers Resolution and described the consultation provision as a "practical mechanism for improving the decision process and for ensuring congressional involvement before American forces are committed to battle." Furthermore, he was of the belief that consultation was "even more necessary in this threatening, modern world -- particularly if the law is carried out by both branches effectively and in a good faith effort to make the process work."

Before turning his attention to the administration's record of compliance, he considered the constitutional objections to the War Powers Resolution. These objections, he declared, were intended to obscure compliance issues rather than to illuminate the intent of the Framers.

He claimed that none of the law's challenged provisions had been invoked since its passage, particularly the automatic withdrawal of the U.S. Armed Forces after 60-90 days unless authorized by Congress. Even if that provision was ruled infirm, it did not adversely affect the consultation and reporting features of the law.

Turning from these "canards" developed to dodge legal requirements, Mr. Atwood described efforts by administrations since 1973 to take advantage of political and other circumstances to "pervert[] the original intent of Congress when it passed the War Powers Resolution." As a consequence, the imbalance between the political branches continues with Congress more "in the role of observer rather than player." He expressed

the view that a continuance of this situation will erode "public confidence in dealing with the highly complex and serious threat of terrorism."

Three factors were asserted to motivate administrations to avoid consultation and reporting: (1) legal or fear that presidential powers will be lost by desuetude; (2) policy or a threat to a "careful balancing of competing options within the Administration"; (3) security or widening to a dangerous extent the number of people who know about a sensitive operation.

Acknowledging that concerns for security were legitimate concerns, he nevertheless suggested that these were largely misplaced because of an erroneous conception of elected officeholders.

As a former participant, Mr. Atwood testified that administration lawyers developed imaginative schemes and devices to avoid consulting with Congress including dangerous and disastrous adherence to peacetime "rules of engagement".

Compliance with reporting was similarly doleful. Mr. Atwood described the facts of U.S. involvement in Lebanon, including the death and wounding of U.S. personnel and air and naval strikes, which were never recognized or reported by the Executive as being hostilities.

Going over the terms of the consultation provision and its legislative history, Mr. Atwood concluded that it clearly applied to the most recent Libyan incident. He noted that certain foreign powers were consulted days in advance of military operations whereas Congress was given a scant three hours to consider the matter.

Furthermore, consultation both in its popular significance as well as intended by Congress, meant seeking advice and counsel, not notifying or informing.

PREPARED STATEMENT OF HON. ABRAHAM D. SOFAER, LEGAL ADVISER, DEPARTMENT OF STATE

Assertions of the scope of the powers of Commander-in-Chief made by Executive Branch spokemen were limitless and in his opinion, portend the virtual elimination of the congressional war powers.

For a variety of reasons which he spelled out, Mr. Atwood claimed that Congress could make a valuable contribution if consulted on the use of force, including the use of anti-terrorists units. Members of Congress, he noted, have infinitely more experience in dealing with military and foreign affairs than White House functionaries. Accordingly, he endorsed proposals to establish a congressional consultative unit comprised of certain key committee chairmen and ranking members.

Mr. Atwood concluded that now more than ever, the combined judgment of Congress and the President is essential in all undertakings that can lead to war.

[Whereupon, at 1:12 p.m., the subcommittee was adjourned subject to the call of the Chair.]

WAR POWERS, LIBYA, AND STATE-SPONSORED TERRORISM

THURSDAY, MAY 1, 1986

House of Representatives,
Committee on Foreign Affairs,
Subcommittee on Arms Control,
International Security and Science,
Washington, DC.

The subcommittee met at 9:40 a.m., in room 2172, Rayburn House Office Building, Hon. Dante B. Fascell (chairman) presiding.

Chairman Fascell. The subcommittee will come to order.

We meet this morning to continue our hearings on war powers, Libya, and state-sponsored terrorism. We will continue to explore the issue of how to integrate executive branch compliance with the War Powers Resolution with an effective strategy for dealing with state-sponsored terrorism; what part the Constitution plays in this process; how to improve our procedures, if that is possible, for consultation under the War Powers Resolution in responding to terrorism and what the President's pronouncement with respect to military responses to terrorism means in terms of law, and how the Constitution is interpreted.

We have with us two outstanding legal scholars to help us deal with these critical questions. We have Mr. Archibald Cox, Carl Loeb University Professor Emeritus, of Harvard University and president of Common Cause; and Mr. Taylor Reveley III, the managing partner of Hunton & Williams, and a reknowned constitutional lawyer and scholar.

Gentlemen, we want to thank you for making an appearance here today and for the time you took to make a contribution to this subject.

I guess we can start on a common note: The discussion appears to be endless, since it started with the founding of our Nation. Hopefully, it will never end.

In any event, we are delighted to have both of you eminent gentlemen here today to help us through this thicket.

Why don't we start with you, Mr. Cox. You have a prepared statement. We will put that in the record in its entirety. You may summarize, if you wish.

STATEMENT OF ARCHIBALD COX, CARL M. LOEB UNIVERSITY PROFESSOR EMERITUS, HARVARD UNIVERSITY, AND CHAIRMAN, COMMON CAUSE

Mr. Cox. Thank you very much, Mr. Chairman.

I have furnished a statement which I will summarize, state the high points of, and try to be as brief as possible.

I do want to say first I do appreciate this opportunity. Along with that, you, Mr. Chairman, and this committee, deserve the support and heart-felt thanks of the American people for undertaking a sensitive and difficult task of grave and urgent national importance.

On the one hand, all of us wish to be sure that the United States and its Government are just as far as possible equipped to combat, prevent, and punish the terrorists and sponsors of terrorism who are so savagely destroying property and mutilating and murdering innocent people.

On the other hand, it is absolutely essential for us to be viable as a self-governing people that the evil of terrorism and our passionate sense of outrage against it not be used or even allowed to rush us into upsetting the constitutional balance of war-making powers as clarified and implemented by the War Powers Resolution of 1973.

What is required is the kind of careful, sober, and informed inquiry that this committee is equipped to give to two related questions: One, does the urgent need for effective action to prevent, punish and deter terrorism require modification of the War Powers Resolution? The other is: Can and should the War Powers Resolution be improved and strengthened so that the United States is not committed to armed hostilities without the full participation of the people of the United States through its elected Representatives in Congress?

I may say very briefly in approaching those questions, that while we should be openminded in considering whether there is need for change to meet present exigencies, I do start thinking that the basic allocation of power between Congress and the Executive defined in the War Powers Resolution is both constitutional and wise. The reasons are spelled out in my statement. I won't take the time for that here.

In considering whether new legislation is needed, I should think the committee would wish to take note, first, of the flexibility already available to the President under the War Powers Resolution. The restrictions seem to me to be few and not at all unreasonable.

One is that the President may not initiate a war, even on a country that supports terrorists, without a declaration of war by Congress. Surely both the Constitution and self-government require that the people of the United States grant authority through their Representatives before they are committed to those kinds of hostilities.

The only other advance restriction is section 3 of the War Powers Resolution which requires the President to consult Congress in every possible instance—I emphasize the words—before introducing the United States into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.

I would suppose, Mr. Chairman, that those words left considerable room for using, even without prior consultation, small units of military personnel directly against terrorists where there is no attack upon a de jure or de facto government, and there is no indication that a de jure or de facto government will resist the counter-

terrorist measure. I think, as one example of others mentioned in my statement, of the forcing down of the Egyptian airliner believed to carry terrorists.

The requirement of consultation—not just notification but genuine consultation—seems hardly to be an onerous restriction when one bears in mind the need for bipartisan support and national unity, whenever hostilities are imminent. The President retains power of decision. I would think surely any foreseeable bugs in establishing a formal or informal format of consultation would be easily worked out by this committee and people in the executive branch in advance, if only the national security establishment would substitute a new spirit of cooperation for its present grudging resistance to the War Powers Resolution, of which I will speak in a moment.

The remaining restrictions, as the subcommittee knows, do not impair the President's short-term flexibility. They require a report and withdrawal within 60 days if the Congress does not act. But if hostilities or likely hostilities are involved for more than 60 days, then the resolution requires the President to obtain the consent of Congress through a joint resolution or declaration of war. Again, surely that is not an unreasonable way of putting the matter before the American people.

I mention one other course that is open under present law. The President, if a foreign nation is sponsoring terrorism—protecting terrorists on a scale that involves it in a large way—then the President, even now, has power to come before the Congress and seek a specific resolution authorizing him from time to time to take such narrowly defined countermeasures as he, in his discretion, deems necessary. The timing of them, the character of them, need not be disclosed in a way that would endanger security.

In saying that, I am mindful of the Tonkin Gulf resolution and the subsequent debate. But I suggest that draftsmanship ought to be possible, with that reminder of mistakes, to cope with the danger of any resolution being read too broadly.

To turn to possible alternatives, I earnestly submit to the committee that the bill offered in the other branch by Senators Dole and Denton, and in the House of Representatives by Representatives Barton, Hunter, and Livingston, is an unnecessary, rash, and highly dangerous overreaction. If adopted, the bill, as I read it—and I am quite sure I am right—the bill would authorize the President to use the Armed Forces of the United States as he deems necessary to counter terrorism; in other words, in any way and on any scale he may choose.

The bill would supersede the War Powers Resolution. As explained by Senator Dole, it would authorize action to preempt terrorism without even waiting for a specific terroristic act. The net effect is to authorize the use of the Armed Forces at any time, on any scale, that the President deems useful to deter terrorism. Syria, Libya, Iran, Bulgaria, Vietnam, and Nicaragua—all come quickly to mind.

Indeed, to be specific, President Reagan has said the Sandinista regime in Nicaragua is training and giving refuge to terrorists. The Dole bill would then empower the President to send Armed Forces

to Nicaragua now, at once, to punish or topple that regime and to keep them there indefinitely.

I sincerely hope, as do my colleagues at Common Cause, that the committee will reject any such legislation.

I turn, then, Mr. Chairman, to the question: Can and should the War Powers Resolution be improved and strengthened so that we preserve the historic balance of power, the involvement of people and their Representatives in important decisions involving hostility? Here I would think that the committee would wish to focus first upon section 3, which provides that the President, in every possible instance, shall consult with Congress before introducing U.S. Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.

The bombing of the Libyan military installations without prior consultation with Representative congressional leaders plainly violated the spirit and intent of section 3. I think very probably it violated the literal meaning of the words. Certainly, the use of 25 war planes to invade the air space of a foreign power is introducing Armed Forces into hostilities. If it is not, surely it introduced them into a situation where hostilities were imminent, because nobody could suppose that there would not be some return fire.

Equally clearly, it was possible—the word "possible" was used deliberately—for the President to engage in consultation; and equally plainly, there was no consultation before the step was taken. The meaning of consult is plain enough, but I would remind the members of the subcommittee, and you, Mr. Chairman, that careful attention was given to the meaning in the report of this committee on the original War Powers Act. It is worth taking a moment to read it, I think.

A considerable amount of attention was given to the definition of consultation. Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action being contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.

We know from many statements, including yours, Mr. Chairman, that the congressional leaders were merely informed of the action already underway against Libya.

I think the only possible uncertainty about the justice of the charged violation arises from the fact that section 3 requires consultation with Congress. I would think the plain meaning is with Representative leaders of the Congress. But I have to concede those words are not there.

I think the committee should consider whether it should not clarify and thereby strengthen this part of the requirement of consultation in order to make clearer what form the consultation should take. Here, I remind you of the proposal put forward by Senators Byrd, Leahy, Nunn, and Pell. Perhaps there are others that have not come to mind.

I would also suggest in this connection that members of the committee may wish to put their minds on establishing informally, but in advance, the parts and kinds of mechanisms of consultation that can't always be prescribed in the statute, but that can be worked out, suggested in the committee report, and worked out if again the executive branch will cooperate in working them out.

It is hard for me to believe that an adamant insistence on one view of Presidential prerogatives that excludes participation of the Congress will continue to lead the President to turn away from working out that kind of cooperative endeavor which is necessary to get both the bipartisanship and the national unity that are required in such a situation.

Finally, on this point—or next to finally, on this point, Mr. Chairman—if the committee wishes to recommend legislation, I would think it would do well to introduce a definition of consultation, capturing the essence of the definition already present in the earlier House committee report.

Finally, I mentioned—and you will find a discussion in my statement—the question of whether the *Chadha* decision raises problems that require some change in the provision providing for a concurrent resolution of Congress, requiring the return of troops in less than the 60-day period now allowed. It is a close question whether *Chadha* applies. You will find a discussion of it in my statement.

One final word. In weighing the need for change in the War Powers Resolution, the committee must take into account the unhappy fact that the entire national Defense Establishment continues persistently to resist the participation of the people's elected Representatives in decisions involving the introduction of Armed Forces into hostilities or into a situation in which the risk of hostilities is imminent. They attack the War Powers Act as unconstitutional.

Executive compliance has certainly been grudging and without acceptance of the statutory and constitutional obligation. The spirit, if not the letter, requiring prior consultation, has been violated.

One must bear in mind, therefore, that if any new exceptions were to be written into the resolution, contrary to my belief they are not necessary, the very utmost latitude would be taken by the Executive in construing them. Under these circumstances, Mr. Chairman, I would think that the committee should seek an appropriate way of expressing its commitment and the commitment of the Congress to the War Powers Resolution—indeed, its commitment not only to the resolution but to the constitutional right of Congress to share in such decisions.

If the committee strengthens the resolution along the lines I have suggested, or some others, that too would furnish an occasion for revealing that commitment. If no changes in the act seem feasible or appropriate, then I would still think you would wish to give very careful consideration to whether a resolution of the committee or the House or the whole Congress was not an important way of reaffirming the constitutional right of Congress and a commitment to the War Powers Act.

I am mindful, particularly—as I am sure the committee will be—of the late Senator Javits' warning that, "Whether or not the War Powers Resolution is enforced will depend upon the determination of Congress to stand up and fight for its constitutional rights respecting war." That, very plainly, is the question now.

To conclude, in our outrage at terrorists and the responses to terrorism, we ought not to forget that the history of liberty is one of constant vigilance against the accumulation of power by an executive. We need to take care now more than ever not to let the Executive erode one of our most precious national legacies, the constitutional separation of powers and the checks and balances that are part of it.

Thank you very much, Mr. Chairman.

[Mr. Cox' prepared statement follows:]

Prepared Statement of Archibald Cox, Chairman, Common Cause

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to testify before the House Foreign Affairs Committee on the War Powers Act of 1973.

The Committee deserves the support and heartfelt thanks of the American people for undertaking a sensitive and difficult task of both urgency and grave national importance. On the one hand, all of us wish to be sure that the United States and its government are, insofar as possible, equipped to combat, prevent, deter, and punish the terrorists and sponsors of terrorism, who are so savagely destroying property and mutilating and murdering innocent people. On the other hand, it is essential to our survival as a self-governing people that the fear of terrorism and our passionate sense of outrage at acts of terrorism not be used, or even allowed, to rush us into hastily upsetting the constitutional allocation of war-making powers as clarified and implemented by the War Powers Resolution of 1973. What is required is the kind of careful, sober and informed inquiry that this Committee is equipped to give to two related questions:

I. Does the urgent need for effective action to prevent, punish and deter terrorism require modification of the War Powers Resolution?

II. Can and should the War Powers Resolution be improved and strengthened so as to assure that the United States is not committed to armed hostilities that may lead to war, without the full participation of the people of the United States through their representatives in Congress?

In approaching these questions I start from the premise that although we should be open-minded in considering whether there is need for change to meet present exigencies, the basic allocation of power between the Congress and the Executive defined by the War Powers Resolution is both constitutional and wise. The Constitution vests in Congress the power "to declare war." Madison's notes make plain that this means all power to make war is vested in Congress, except for the limited power to repel an armed attack upon the United States or its Armed Forces. That is the virtually unanimous meaning put upon the Constitution by its Framers, as demonstrated in oft-quoted passages from Thomas Jefferson, James Madison, James Iredell, James Wilson and William Patterson. The Supreme Court of the United States has adopted this interpretation when the issue has been raised. In Talbot v. Seeman 1 Cranch, 1, 26 (1801), Chief Justice Marshall said for a unanimous Court --

> The whole powers of war being, by the constitution of the United States vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry [into authority for the capture of a foreign vessel in time of international conflict].

Similarly, in the Prize Cases, 67 U.S. 635, 668 (1863), the Court said:

> By the Constitution, Congress alone has the power to declare a national or foreign war. . . . [The President] has no power to initiate or declare a war either against a foreign nation or a domestic state.

The constitutional designation of the President as the "Commander-in-Chief of the Army and Navy of the United States" is not inconsistent with this conclusion. As explained by Alexander Hamilton in The Federalist Papers --

> [T]he President is to be Commander in Chief of the Army and Navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies; all which, by the Constitution under consideration, would appertain to the Legislature. (emphasis in original.)

The argument that history validates the assertion of broader executive authority rests upon a misconception. That Presidents did exercise broader authority for many years is beyond question; but as Justice Jackson pointed out in his concurring opinion in Youngstown Steel and Tube Co. v. Sawyer 343 U.S. 579, 634 (1952), the powers that the President may exercise with the silent acquiescence of Congress are much broader than the powers irretrievably vested in him by virtue of Article II and his Office. The Constitution also gives Congress explicit authority "to make rules for the government and regulation of the land and naval forces," and to "make all laws which shall be necessary and proper for carrying into execution" any power vested in the government of the United States or in any Officer.

By enacting the War Powers Resolution, Congress wisely reasserted its control in a time when the nature of hostilities was undergoing radical change, and thus constitutionally defined and confined the discretion of the President. That action too was responsive to an original theme. As explained by Thomas Jefferson in 1789 --

> We have already given in example one effectual check to the Dog of war by transferring the power of letting him

> loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.

I.

Does the urgent need for effective action to prevent, punish and deter terrorism require modification of the War Powers Resolution?

1. In considering whether other, new legislation is needed for the United States to cope with terrorism as effectively as possible the Committee will wish to take note of the flexibility already available to the President under the War Powers Resolution. The restrictions seem to me to be few and not unreasonable.

(a) The President may not initiate a war, even on a country that supports terrorists, without a declaration of war by Congress. Surely, both the Constitution and sound policy require that the people of the United States grant authority, through their representatives, before they are committeed to such hostilities. As Abraham Lincoln said, "no one man should hold the power of [making war]." Only an expression of the combined judgment of the President and the Congress can ensure that, if the American people must go to war, they will stand united.

(b) The only other advance restriction on the President's discretion in use of the Armed Forces to counter or prevent terrorism is Section 3 of the War Powers Resolution, which requires the President to consult Congress "in every possible instance" before --

> introducing the United States into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.

I would suppose, Mr. Chairman, that these words left considerable room for using without prior consultation small units of military personnel directly against terrorists where there is no attack upon a de jure or de facto government and there is no clear indication that the de jure or de facto government will resist the counter-terrorist measure. The steps that occur to me, if confined within this limitation, include, for example --

-- The direct prevention of acts of terrorism.

-- The direct protection of embassies, consulates and military installations.

-- Such activities as the use of the U.S. Air Force to intercept and force the landing of an Egyptian airplane believed to carry the terrorists responsible for the hijacking of the Achille Lauro cruise ship.

-- The participation of U.S. forces, alongside British forces, in an attempt to rescue American hostages hypothetically being held in the U.S. embassy in London by Libyan terrorists.

I repeat that these are examples of what might be done only if there is no attack upon a de jure or de facto government and no clear indication that the de jure or de facto government will resist the counter-terrorist measure. But the steps are not unimportant.

(c) I shall discuss the requirement of "consultation" -- not just notification but genuine consultation -- in more detail later as an illustration of the need to clarify and strengthen the War Powers Resolution. It is enough to say now that genuine

consultation with Congress seems hardly to be an onerous restriction when one bears in mind the need for bi-partisan support and national unity. The President retains the power of decision. Surely, any foreseeable "bugs" in establishing a format of consultation can be worked out in advance, if the National Security Establishment will substitute a new spirit of cooperation with the Congress for its present grudging resistance to the War Powers Resolution.

(d) The remaining restrictions on Presidential actions imposed by the Resolution similarly do not impair the President's flexibility to respond to terrorism. They require reports to Congress after the event and establish a 60-day deadline beyond which troops must be withdrawn absent Congressional action -- a declaration of war or authorization of their continued presence. If more than 60 days of foreign operations is required, the magnitude of the operation deserves a Congressional vote upon continuance.

(e) Still another course is open to the President under existing law. The President may seek specific statutory authorization to use the Armed Forces of the United States in such narrowly defined ways as he deems necessary from time to time against a specific country or countries supporting terrorism, for a specific period of time. The Joint Resolution authorizing participation in the international peace-keeping force in Lebanon shows the kind of procedure available, even though the occasion and the action authorized were altogether different.

It may be objected that seeking and granting such authority might exacerbate relations with the country sponsoring terrorism. Surely such action would never be taken unless relations with the government supporting terrorism were already as bad as could be, and that government had been warned that continuance of the same course would risk countermeasures designed to protect American lives. The resolution could not make the already intolerable situation worse. Nor would it increase the danger to Americans in the Armed Forces by detailing the time and place of specific countermeasures. Within the Congressionally prescribed range of tactics the choice should be left to the President and the Armed Services.

In pointing to this course I am not unmindful of the Tonkin Gulf Resolution of 1964. That unhappy source of later controversy warns not only of the dangers of acting loosely and rashly in a surge of emotion, but also of the need for skillful draftsmanship. The problems of draftsmanship undoubtedly require more thought now, in advance; but I am inclined to think that they are susceptible of wise resolution.

2. The bill offered in the other branch by Senators Dole and Denton and in the House by Representatives Barton, Hunter and Livingston is, in my judgment, an unnecessary, rash and highly dangerous over-reaction. If adopted, the bill would authorize the President to use the Armed Forces of the United States "as he deems necessary" to counter terrorism; in other words, in any way and on any scale he may choose. The bill would supersede the War Powers Resolution. As explained by Senator Dole, it gives

authority to preempt terrorism without waiting for any specific acts of terrorism. The net effect is to authorize use of the Armed Forces at any time and on any scale that the President may say is useful to deter terrorism. Libya, Syria, Iran, Bulgaria, Viet Nam and Nicaragua come quickly to mind.

To be specific, President Reagan has said that the Sandinista regime in Nicaragua is training and giving refuge to terrorists. The Dole bill would empower the President to send Armed Forces to Nicaragua at once to punish or topple that regime and to keep them there indefinitely.

We of Common Cause sincerely hope that this Committee and the Congress will reject any such legislation.

II.

Can and should the War Powers Resolution be improved and strengthened so as to assure that the United States is not committed to armed hostilities against a foreign nation that may lead to war, without the full participation of the people of the United States through their representatives in Congress?

1. In considering whether the War Powers Resolution should be improved and strengthened so as to prevent further erosion of the powers of Congress by executive action, the Committee may first wish to focus upon Section 3, which provides that the President --

> In every possible instance shall consult with Congress before introducing U.S. Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. . . .

The bombing of Libyan military installations without prior consultation with representative Congressional leaders plainly violated the spirit and intent of Section 3. Very probably it also violated the literal words.

The use of 25 warplanes to invade the airspace of a foreign nation and to attack its military installations and armed forces would seem pretty clearly to fall within the words, "before introducing United States Armed Forces into hostilities." If not, surely the action introduces them into a situation "where imminent involvement in hostilities is clearly indicated by the circumstances." No one could rationally have supposed that the Libyan armed forces would not shoot back.

Equally clearly, this was a situation in which it was "possible" for the President to engage in consultation with representatives of Congress.

Again plainly, there was no consultation before the step was taken. The meaning of "consult" is plain enough. The report of this Committee in recommending the bill that became the War Powers Resolution explains the intended significance (H. Rep. No. 93-287, p. 6):

> A considerable amount of attention was given to the definition of consultation. Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action being contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available."

In the case of the bombing of Libya, Congressional leaders were merely informed of the operation after the bombers had been underway for two hours. In a letter to the President, Senate Minority Leader Robert Byrd, Ranking Member of the Foreign Relations Committee Claiborne Pell, Ranking Member of the Armed Services Committee Sam Nunn, and Patrick Leahy, Vice Chairman of the Select Committee on Intelligence said --

> . . . the first indication of your decision was at a meeting Monday afternoon at the White House, after the operation was already underway, and this amounted to a notification of your actions rather than the consultation required by law.

In the course of commenting on the Libya attack, House Minority Leader Robert H. Michel said, "We really ought to have some sort of vehicle for getting Congress into the mix, so we're not left out in the cold."

Senator Nunn further commented, "I don't think there was enough consultation . . . there should have been more . . . when the President is examining some of the options, it would be helpful for Congressional leaders to look at some of those options, before he decides. That's consultation."

The only possible uncertainty about the justice of the charge of violation arises from the fact that Section 3 requires the President in such situations to consult "with Congress," if possible, before he acts. I would suppose that in this context those words pretty clearly mean "consult with Congress <u>through its representative leaders</u>." Perhaps no other course is possible when military action must be taken promptly and without advance warning.

The intent is already plain enough, but I suggest that the Committee should carefully consider removing any verbal uncertainty by an amendment specifying that the consultation shall take place with representatives of Congress. Here the proposal advanced by Senators Byrd, Leahy, Nunn and Pell in their letter to the President, specifying eighteen Senators and Representatives by office, may furnish a starting point for further deliberation by the Foreign Affairs Committee.

I can think of only two possible objections to this kind of clarification. The first -- that the President should not be required to consult anyone -- hardly deserves mention. The second -- that consultation might endanger secrecy -- seems to me equally without merit. Serious consideration of the introduction of United States Armed Forces into hostilities or into situations where hostilities are imminent, requires the involvement of at least thirty-five or forty individuals in the Executive Branch. The addition of a reasonable number of responsible Congressional leaders surely would not appreciably increase the danger of leaks, especially if their commitment to secrecy were made plain. Congressional leaders are no less responsible than Executive officials.

2. May I also suggest in this connection, Mr. Chairman, that the members of this Committee may wish to put their minds on establishing informally those further mechanisms for consultation that cannot wisely be frozen into statutory form. Such mechanisms might well call for continual informal consultation according to a set procedure even before the War Powers Resolution

requires it, as well as for the consultation that the Resolution mandates.

Such arrangements would require sincere cooperation from the Executive Branch. The past record is not encouraging in this respect, but, at least until the contrary is established, the opportunity deserves exploration. It is hard to believe that adamant insistence upon one view of Presidential prerogatives -- a view that excludes participation of the Congress as the most representative arm of the people -- will continue to lead the President to turn away from the only available mechanism for securing the bi-partisanship and national unity necessary to support measures that in the present troubled international situation may be required by terrorism and like hostilities short of war.

3. If the Committee decides to recommend legislation, I suggest that it also consider introducing a definition of "consult" that captures the essence of its 1973 report quoted above and thus leaves no room for evasion.

4. Finally, because of the decision of the U.S. Supreme Court in INS v. Chadha, 462 U.S. 919 (1983), the Committee may wish to give careful attention to Section 5 of the War Powers Resolution. As enacted, Section 5 not only limits to 60 days the duration of the power of the President to keep the Armed Forces engaged in hostilities or in situations in which an outbreak of hostilities is imminent; it also reserves to Congress the right to require the recall of the Armed Forces in less than 60 days by concurrent resolution. The Chadha decision casts no doubt upon

the 60 day limitation, but the Court's opinion presents a risk that the reservation of Congressional power to require an earlier halt would be held unconstitutional.

On the one hand, Chadha is distinguishable: first, because the case involved action by less than the whole Congress; second, because the War Powers Resolution regularizes and clarifies the constitutional division of power between Congress and the Executive whereas the immigration law was a straightout delegation of power; and third, because Section 5(c) may be fairly described as a limitation upon the duration of any Presidential authority whereas Chadha attempted to reserve Congressional power to overrule a President's decision in specific instances while leaving the delegated power unaffected.

On the other hand, if the language in the Chadha opinion indicating that Congress cannot act effectively except upon compliance with the Presentment Clause has universal application, then Section 5(c) cannot survive. (Because the War Powers Resolution contains a separability clause, the provisions of the Resolution would remain unaffected.)

If the Committee reviews Section 5(c), two alternatives deserve its careful consideration.

(a) One is to substitute words calling for a Joint Resolution in place of the present provision for a concurrent resolution. Presentation of a Joint Resolution to the President would seem to satisfy even the most expansive reading of Chadha, but it would also diminish the role of Congress because the Joint

Resolution would have to be signed by the President or passed over his veto.

(b) The second, and probably preferable, alternative is to shorten from 60 days to 30 days the period for which the President may use the Armed Forces in a manner short of making war without specific authority from Congress. We urge the Committee to give this step the most careful consideration. I am confident that, in situations where both the national honor and war and peace are at stake, Congress has the capacity to organize itself to act wisely and with all deliberate speed. In such situations, the constitutional balance of power, the need for bi-partisan support and national unity before going further in hostilities, and the preservation of democratic self-government, all require a decision by Congress as the most representative organ of the people.

III.

In weighing the need for any change in the War Powers Resolution the Committee must take account of the unhappy fact that the entire National Defense Establishment continues persistently to resist the participation of the people's elected representatives in decisions involving the introduction of Armed Forces into hostilities or situations in which the risk of hostilities is imminent; it resists even though the lives of hundreds or even thousands of Americans may be lost and the Nation may be precipitated into war. The War Powers Resolution is attacked as unconstitutional. Executive compliance has

usually been grudging and without acceptance of the statutory and constitutional obligation. The point is illustrated by U.S. military actions in Grenada, Lebanon, and Libya and very probably, in El Salvador and Nicaragua. The spirit, if not the letter, of the requirement for prior consultation has been repeatedly violated. Clearly, the utmost latitude will be read into any new exceptions or modifications. To say this is not to question or approve in any other respect the action the President took against Kaddafi.

Under these circumstances, I suggest, Mr. Chairman, that this Committee should seek an appropriate way of expressing its commitment and the commitment of Congress to the War Powers Resolution -- indeed its commitment not only to the Resolution but also to the constitutional right of the Congress to share in any decision to commit U.S. Armed Forces to hostilities or into situations where the risk of hostilities is imminent. The realities of today's complex international environment are such that there will be repeated need to consider the use of U.S. Armed Forces in hostilities short of war. We should not shrink from the choice when there is genuine necessity. But in making those choices the role of Congress and the balance of war-making powers envisioned by the Founding Fathers and laid out in the War Powers Resolution should be preserved. The decision to commit U.S. troops into hostilities is of such profound importance that it should be and must remain a shared responsibility of the Executive and Legislative branches.

The late Senator Javits warned that, "Whether or not the [War Powers] Resolution is enforced will . . . depend upon the determination of the Congress to stand up and fight for its constitutional rights respecting war, on the one hand, and the power of the President to get the country to side with him politically and thus make the Resolution a nullity, on the other." It is now up to the Congress, and through it the people, to reconfirm and exercise its constitutional responsibility so that this and future administrations follow the spirit and letter of the law and the Resolution is neither undermined nor eroded.

In our outrage at terrorists and the sponsors of terrorism we must not forget that the history of liberty is one of constant vigilance against the accumulation of power by an executive. We must take care, now more than ever, not to erode one of our most precious national legacies -- the system of checks and balances that for nearly two hundred years has kept out Nation free and preserved our people's liberties.

Chairman FASCELL. Thank you very much, Mr. Cox, for that overview and for the suggestions which you included in your testimony.

Now we will hear from Mr. Reveley.

STATEMENT OF W. TAYLOR REVELEY III, MANAGING PARTNER, HUNTON & WILLIAMS

Mr. REVELEY. Thank you, Mr. Chairman.

I have been struggling with the mysteries of the war powers for almost 20 years. They are remarkably complex and endlessly fascinating. Successful resolution of these mysteries, I am convinced, is vital to this country's welfare. Thus, it is always good to talk with people who have the capacity to move toward a successful resolution.

Let me begin by stating four conclusions. I will then very briefly put some flesh on each conclusion.

First, state-sponsored terrorism does not require or justify any new division of the war powers between the President and Congress.

Second, the War Powers Resolution does potentially—potentially—provide a vehicle for Congress to participate in decisions whether the United States is or is not going to use force against state-sponsored terrorism.

Third, if Congress is actually to realize that potential, if it is in fact to use the War Powers Resolution as a vehicle to participate in use of force decisions, it must effectively see to the implementation of section 3 of the resolution, the consultation provisions.

Fourth, and finally, if Congress is effectively to insist that the President implement section 3, then, in my judgment, Congress must itself designate a small number of its own leaders, Members expert in foreign affairs, intelligence matters, and armed services matters, as a congressional consultation committee.

Let me put some flesh on these conclusions. The arguments for leaving American response to state-sponsored terrorism to the President do not sound any new war powers themes. Since 1789, the suggestion has been made that the need for speed or secrecy, or both, in certain uses of force, require Presidential hegemony over those uses of force.

By the same token, since 1789, it has been suggested that when the use of force required to deal with a particular situation is relatively modest—almost trivial—then those modest uses of force should be left wholly to the President.

But, deeply rooted in the language of the Constitution and in the purposes the framers and ratifiers had when they adopted that language is the necessity that Congress participate in American decisions regarding the use of force against other states, irrespective of whether the use of force require secrecy, speed or only modest coercion.

The way in which Congress is involved in making those decisions may well vary with the times and with the circumstances of particular uses of force, but not the necessity that Congress be involved.

60-907 O - 86 - 5

In short, there is no necessity, because state-sponsored terrorism has arisen to the degree and with the malignity that it has, to adopt a new constitutional understanding of the war powers.

A bit of flesh for my second conclusion: The War Powers Resolution, the much maligned War Powers Resolution, does in fact provide a potential vehicle for Congress to participate in decisions regarding American response to state-sponsored terrorism. The War Powers Resolution will have its 13th birthday on November 7 of this year. By any reasonable measure, it has had a very, very troubled childhood.

At times, when I have participated in discussions of the War Powers Resolution with others who delve into such matters, it has seemed that I was the only participant who really liked the fledgling; and even I don't like all aspects of it. People strongly devoted to congressional prerogative often find the War Powers Resolution unclean because, as a practical matter, it does not provide for prior congressional approval of American use of force.

The King's party, by the same token, does not like the War Powers Resolution because it does provide, at least on its face, for significant Executive consultation with congress before the President acts and, more to the point, for congressional review and control of continued military action once the President has begun it.

There is effective congressional involvement in the resolution after the fact, assuming the use of force lasts long enough for there to be an after the fact. Both branches often find consultation under the resolution to be a flawed process.

Congress points out that the President generally implements section 3 if at all, too late and on a mere notice basis—too late, mere notice.

Presidents, in turn—President Ford most vigorously—point out that sometimes it is hard to find anyone in Congress to consult; that when Members are consulted, at times they are distracted by other matters, not truly attentive; and that there is concern that Members or their staffs will leak.

Nonetheless, in my judgment, the War Powers Resolution, the fledgling, does have brilliant potential. I use the adjective advisedly. In my view, the resolution embodies an emerging constitutional consensus in this country that will resolve much of the conflict and much of the mystery that that has plagued the war powers for 200 years. That emerging constitutional consensus takes into account both threads that must be effectively interwoven if we are, in fact, to stop haggling over how the war powers are constitutionally divided between the President and Congress.

On the one hand, the resolution takes into account the language of the Constitution and the framers' and ratifiers' purposes, which unavoidably indicate that there must be congressional involvement in American decisions to use force, if those decisions are to be legitimate.

On the other hand, the resolution takes into account the reality of 200 years of practice under the Constitution, 200 years of its interpretation by Presidents and Congresses, and occasionally courts. This practice indicates that, when Congress has provided the tools to the President—men, money, materiel—and when Congress has not previously banned a particular use of force, then the President

may on his own initiative begin it. Two hundred years of practice make that inescapably clear.

Again, the brilliance of the War Powers Resolution is that it intertwines these essential threads. It insists on meaningful congressional involvement by prior consultation and by after-the-fact review of prompt Presidential reports on the use of force—reports that, if the resolution were honored, would contain real information—and by an opportunity, indeed necessity, that Congress participate in authorizing continuation of any American use of force that lasts for a significant period.

At the same time, under the operative provisions of the resolution—ignoring the inoperative section 2(c)—the President is left with the opportunity, if he thinks it essential, to initiate the use of force without prior congressional approval. But in doing so he is to be informed and guided by prior consultation, and he is restrained by the reality that he must report immediately to Congress, which may then modify or terminate his armed initiative.

Thus, the resolution simply but effectively combines the two crucial constitutional threads, one spun from the language of the Constitution and its framers' and ratifiers' debates and the other from 200 years of practice under the Constitution. If the resolutions were, in fact, to be implemented, as to consultation in particular, it would constitute Congress' best chance in 200 years to participate systematically in American use of force decisions.

A bit of flesh for my third conclusion: How do you take the troubled child, this near adolescent War Powers Resolution, and bring it to more robust health?

As Mr. Cox just suggested, Congress must focus on section 3. Mr. Cox has already read the language of that section and the crucial paragraph from its legislative history. Everything necessary for consultation as a matter of legislation and as a matter of underlying constitutional principle is in place. All that remains is for people to take the language seriously and implement it.

If that is to occur, however, it is up to Congress. The President is not going to take the initiative. Even President Carter, who said kind things about the resolution, did not consult during his moment of truth, the attempted Iranian hostage rescue. Presidents will not voluntarily implement section 3 in any material sense.

In reality, however, the consultation provision, section 3, is the only means Congress has to influence short, surgical uses of force by this country. If Congress wishes to participate in decisions about such uses, it must do so through section 3.

Section 3, by the same token, is Congress' best means to get the information necessary to prepare itself to make the termination or modification decisions that it can and probably will make for any use of force that lasts a significant period of time.

My fourth conclusion: Assuming Congress has the interest and the will to try to implement section 3—to compel the President to implement it, which means to persuade and cajole him as well as to compel him—Congress must do something very difficult for it, though perfectly feasible. It must do more than simply complain when the President fails to consult.

We now have many examples of congressional complaint after Presidential failure to consult under section 3. Congress has got to

go further. It needs to create a congressional consultation committee of sufficient prestige and power, of sufficient experience and expertise, and of sufficient discretion to command the President's attention and respect, as well as the country's. Such a committee, over time, could bring the President to meaningful consultation, at least in most cases.

A congressional consultation committee should have five characteristics: First, it should be a joint committee—a species not favored, I realize.

Second, it should be relatively small—again, difficult to achieve, since many Members would wish to participate.

Third, it should be senior—again, difficult, when many junior people wish to participate.

Fourth, it should be expert in foreign, military, and intelligence affairs. That requirement, that criterion, could be more easily met.

Fifth, it must be capable of operating quickly and secretly.

What would it do? It would immerse itself in the context out of which use of force decisions arise. The committee would gather, and the President would provide on an ongoing basis, information about situations with the potential to become occasions for American use of force. So informed, the committee members would be able to stay abreast of these evolving situations just as the President does.

Second, the consultation committee would meet often. Sometimes it would meet at the White House, sometimes on the Hill, in order that the fact of its meeting not signal imminent armed action and so that the committee could assure a steady flow of information from the President to it.

Third, when occasions arose to decide whether this country is to use force, the committee would meet and consult with the President during his process of decisionmaking. It would provide him with its view of the optimum course of action. In that fashion, it would function much as the framers and ratifiers expected the Senate, a much smaller group in 1789, to function—as a participant with the President in shaping foreign affairs. This is a role the Senate failed to fill during George Washington's administration, but one still potentially available for a congressional consultation committee.

Fourth, the committee would have to operate with appropriate security measures. Congressional committees know how to do that.

Fifth, the committee would need a first-rate, though small, professional staff.

Who would be on a consultation committee? There are a variety of possibilities. Obvious candidates include the leadership of both Houses and the chairmen and ranking member of the Foreign Affairs, Intelligence, and Armed Services Committees. A smaller group would be desirable if holding the size down was politically feasible.

Such a committee would be joint, small enough to be manageable, quite senior and expert, and capable of acting with speed and discretion. The fact that the committee would be joint, in particular, would enable it to have the unity and the information necessary to engage use of force decisions on much the same basis that the President and his most senior advisers engage them.

Let me subside with these observations: Whether Congress does or does not create such a committee—and I understand the practical difficulties of doing so, or at least have a faint glimmer of them—the War Powers Resolution remains our best hope for reaching constitutional consensus on how the President and Congress are to work together to set American policy on the use of force. The resolution will continue to be useful without the creation of a congressional consultation committee, but to realize the resolution's full potential, it needs teeth for section 3. To put teeth in section 3, Congress must prepare itself for consultation in so irresistible a fashion that the President cannot help but succumb.

Thank you, Mr. Chairman.

WAR POWERS RESOLUTION PROVIDES A BASIS FOR DIALOG

Chairman FASCELL. Thank you, Mr. Reveley, for the suggestions you made.

Let me add one other contribution of the War Powers Resolution, and that is that it has given us a basis for dialog to discuss the issue for 13 years. Without that, we would have a hard time thinking about a congressional consultation committee. But we are thinking about it.

Mr. REVELEY. I completely agree, Mr. Chairman. As I said, I like the War Powers Resolution. I think it has had a positie effect. It could do much more, however.

ADMINISTRATION COMMITMENT TO IMPROVE CONSULTATION PROCESS

Chairman FASCELL. Well, you will be happy to know that we have commitments from leaders in this administration to discuss the issue of a congressional consultation committee or some other improvement in the consultation process. That was obviously one of the principal purposes of the War Powers Resolution, to institutionalize the consultation process.

Mr. Solarz.

QUALIFIED SUPPORT FOR SENATE CONSULTATION PROPOSAL

Mr. SOLARZ. Thank you very much, Mr. Chairman.

In terms of institutionalizing the process of consultation, do you think that the approach suggested by Senator Byrd in his legislation makes sense? Would you change it in any way at all? If so, how?

Mr. Cox. I am not sure that under all circumstances I would think it appropriate to require consultation with quite such a large group. Mr. Reveley has made very useful suggestions, all of which deserve careful reflection. There is much wisdom in what he said.

I feel the spirit could be grasped. I would not perhaps go quite as far as he seems to imply in a formal structure. This is going to work if there is a will. A will has to exist on both sides. So, I would want to talk and think a little further, although the basic approach of Senator Byrd and his fellow Senators seems to me to be right.

RELUCTANCE OF EXECUTIVE TO ENGAGE IN CONSULTATION

Mr. SOLARZ. Why do you think there has been such a reluctance on the part of the several administrations that have been in power since the adoption of the War Powers Resolution to engage in any kind of meaningful consultations?

One, of course, hears the argument that secrecy has to be maintained. But the truth of the matter is that the executive branch is responsible for many more leaks than the Congress. We all know that what we are talking about is not consulting with 535 Members but with a relatively small group of senior Members.

I would think that the political advantages to the President of bringing the congressional leadership on board in terms of what he plans to do are so clear and compelling that the Presidents would see this as an opportunity to be seized rather than as a requirement to be avoided. Yet, each administration has, so far as I can determine, fairly consistently, neglected to engage in what would be considered meaningful consultations prior to the introduction of American forces into situations where hostilities are imminent.

CONSULTATION WOULD BENEFIT THE PRESIDENT

Mr. REVELEY. Let me take a bite at that. I think you are right, Congressman; if Presidents tried it, they would like it. This is one reason why, if Congress created a consultation committee to meet with the President, the arrangement would rapidly take hold. But Presidents, I believe, are loathe to take the initiative and invite real consultation lest they seem to concede that prior congressional approval of some sort is required for them to begin the use of force.

RELUCTANCE TO ENLARGE CONSULTATION PROCESS

Second, when trying to make a difficult decision under very complex circumstances, particularly when speed is important, it is hard to put one's own act together, much less to involve another group of people who will want to probe the complexities, explore the alternatives, challenge assumptions, and so forth. To some extent, Presidents are hanging on by their fingernails when dealing with use of force situations and don't feel that they have the time or energy to really involve people from Congress in the process.

FEAR OF LEAKS

Third, whether valid or not, Presidents do very much fear that if people from Congress were really consulted, there would be leaks. While we can all live with our own leaks, it is very difficult to tolerate other people's leaks.

EXECUTIVE REJECTS CONSTITUTIONALITY OF WAR POWERS RESOLUTION

Mr. COX. I would endorse one point and add another. First, I completely agree with what you say about the need for security. If one thinks of the numbers of people that are involved in consulting—civilians—in the executive branch before any step is taken, the addition of Members of Congress is not going to appreciably

add to the leaks. Indeed, we had plenty from the executive branch in the instance of Libya.

The point I would add is, while I have not been connected with the Executive since the adoption of the War Powers Resolution, my sense is that one of the great forces explaining the Executive's position is sort of a historic feeling that has come down today perhaps more at the staff level than at the top. The attitude is, "We must not do anything that would seem to concede any mistake in the Executive's original position that the War Powers Act is unconstitutional. There is sort of a careful, rigid standing on theology almost rather than an approach to what is the way to reach wise decisions and get the country together behind them.

QUESTIONING UTILITY OF THE WAR POWERS RESOLUTION

Mr. SOLARZ. What do you think we really gain by virtue of the existence of the War Powers Act? I ask the question in this sense: Clearly, the Congress has the right to terminate funding for any military operations of which it disapproves, so that even if you didn't have the War Powers Resolution, if the President decided to send American forces into combat and the Congress didn't approve of it, it could vote to terminate the funding.

Each President has rejected the constitutionality of the War Powers Act. If a President sends troops into a situation in which hostilities are taking place and the Congress fails to adopt a resolution approving their presence there, presumably the President would say that is unconstitutional and you can't restrict my power in that fashion; I imagine it would go to the courts.

It is by no means clear that the Supreme Court would rule in favor of the Congress at that point. But, if one assumes that a failure on the part of the Congress or a revel on the part of the Congress to adopt a resolution authorizing the continued presence of American troops in that situation reflected a feeling, a view on the part of the majority, that the troops shouldn't be there, the majority could just as easily terminate the funding.

And, therefore, it is not quite clear to me what the benefits of the War Powers Act really are. If the majority of the Congress is against the use of troops, then it can prevent it by terminating funding; and, if it is not against it, then it is not clear why you need the War Powers Act to elicit expressions of support.

The War Powers Act, you might say, is good for consultation. But it really has not produced meaningful consultation.

My guess is, as you say, Mr. Cox, it is really a question of will. Even if we were to modify the War Powers Act to provide for some kind of consultative committee, either informally or through legislation, you can't instruct the President what to say. You can go through the motions of consultation. You can bring people in and inform them, but not really consult with them.

So, I wonder if both of you could respond to those reflections and indicate why you think, as apparently you both do, that in spite of those considierations the War Powers Act still is useful?

OPTIMISM ON VIABILITY OF THE CONSULTATION PROCESS

Mr. Cox. I think there are a number of points. I will take the last one first.

I am not quite as pessimistic as your statement suggests you might be, but it is right to raise the question. I am not quite so pessimistic about the consultation provisions coming to be accepted and complied with.

As the chairman suggested earlier, sometimes these things take a long time. I am so convinced that good sense requires compliance without weakening any meaningful or important power. Being an optimist, I can't help taking the view that if the Congress cooperates, if it makes its position clear, the resolution will work.

One of the things that was accomplished by the resolution was the requirement of consultation. Another thing that was accomplished was clarifying the constitutional powers. Justice Jackson, in the steel seizure case, pointed out that the President has a larger power where there is no congressional action than he would have when Congress has stepped in under the necessary and proper clause to prescribe the manner in which the United States or any officer of the United States shall perform his duty.

I think one of the things in terms of principle that Congress declared was that the long series of Executive actions to which Mr. Reveley referred in the past, and which were constitutional in the silence of Congress, were no longer acceptable because in the modern world there was too much danger of their promptly precipitating us into a real war costing lives of American soldiers, sailors, and airmen.

So that Congress, in a sense, looking at the record of experience before it, withdrew some of the power that might otherwise be there. I think that, with the history of Vietnam in front of us, the dangers of putting things to the power to appropriate, to the inferences that ought to be drawn from appropriations or failures to appropriate, is a very dangerous course, both in checking misuse of the troops—misuse in the sense of policy.

Although one may have to resort to it, I think that one more thing is important. I would say that, given all the psychology for support for the President, if the Congress fails within the 60 days to adopt a resolution authorizing the action, it pretty clearly means that the country is not unified behind the continuance of the step that has been taken. I think that is a good thing to have made clear; and often, I would hope, it would result in the executive having second thoughts.

I am afraid I am making a speech. I want to add one other point with respect to what you said.

WILL OF THE CONGRESS IN PRESERVING WAR POWERS

It is not clear that the Supreme Court would rule one way or the other on the constitutional question. This is a kind of constitutional question that, in constitutional law terms, as you know, Mr. Solarz, might be designated nonjusticiable, political. Therefore, it is one, I think, where the basic arrangement and preserving that basic arrangement that the framers regarded as so important really depends, as Senator Javits said, on the will of the Congress.

NEED FOR CONSTITUTIONAL CONSENSUS ON WAR POWERS

Mr. REVELEY. Let me suggest four things. First, I take seriously the need for constitutional consensus on the war powers. I grew up in the South in the fifties and early sixties. A tremendous amount of energy went into fighting over the constitutionality of *Brown* v. *Board,* and its progeny, a tremendous amount of very sterile energy. Once we got beyond that, and on to actually improving relations between blacks and whites, there was a remarkable gain for the South's politics and economics.

For almost 200 years—not just now but for almost 200 years—this country has fought over the constitutional division of the war powers between the President and Congress. A tremendous amount of very sterile energy has gone into trying to decide whether one or the other has usurped something recently. If we could get to the point that we agreed on the constitutional framework for decision-making, then to our great benefit we would focus on the merits of particular policies, rather than on usurpation debates.

As I suggested earlier, the War Powers Resolution is brilliant in its intertwining of the two threads that must be linked if we are to reach a constitutional consensus.

WAR POWERS RESOLUTION HAS ENHANCED EXECUTIVE-LEGISLATIVE DIALOG

Second, there has been more continuing dialog between the President and Congress since 1973 over the use of force than there was before, even during the 19th century. The fact that section 3 of the War Powers Resolution is on the books has engendered more consultation than there used to be. The reporting requirement is absolutely new. So, even in its troubled state, the resolution has made a difference.

CONGRESS RETAINS ROLE IN COMMITMENT OF FORCE

Third, I am not unduly concerned about *Chadha.* If the President commits troops who remain in the field 1 week, 2 weeks, 3 weeks, 2 months after the initial commitment, and Congress by majority vote in both Houses acts to limit or end the use of force, I think it most unlikely that, confronted with such an expression of congressional will, the President would disregard it.

I don't think the matter would end up in the Supreme Court. I think the President would either recede, or Congress would probably enforce its will via the appropriations process.

HISTORICAL RELUCTANCE OF CONGRESS TO CUT OFF FUNDS

Mr. SOLARZ. If the votes are there to pass a resolution requiring the termination of our military presence or restricting it in some way, wouldn't the votes also be there to terminate the appropriation?

Mr. REVELEY. That is likely, though it is easier for Congress to state a position on the merits than to cut the money off.

Historically, Congress has been more willing to take positions on the merits of the use of force than it has been to actually cut the funds off. Indeed, until Vietnam——

Mr. SOLARZ. Could you give some examples of that, of where Congress has been more willing to take a position on the use of force rather than to terminate the funding?

Mr. REVELEY. In Buchanan's administration, for example, Congress constantly took positions on whether or not the President should protect American interests in Central America, generally adverse to him. They never cut money off.

There are not many examples, because generally once the use of force begins, Congress acquiesces. But there are far more congressional statements on the merits than there are restrictive exercises of the funding power.

LEGISLATION MAY CHANGE APPROACH TO PROBLEMS

Finally, to finish my four points, particular laws—even if they are far from perfect—can move us in the right direction, can have an effect.

Again, I look at the civil rights analogy. It was constantly said in the South you couldn't pass civil rights legislation and change people's hearts and minds. That was wrong. You can pass legislation, even if flawed and inefficient, and change people's approach to particular issues.

Though far from perfect, the War Powers Resolution does have redeeming social value. It is moving us in the right direction.

CONTINUING VALUE OF WAR POWERS RESOLUTION

Mr. SOLARZ. I really want to thank both of you very much for that statement. I think it is very helpful.

I strongly supported the War Powers Act. I think the hearings the chairman is conducting are very helpful in facilitating a very timely review of that legislation, particularly in terms of whether there is some need to improve it.

But I think you both made a very, very strong and persuasive case for the continuing value of the War Powers Act, even with all of the problems that are associated with it.

Thank you, Mr. Chairman.

Chairman FASCELL. Mr. Hyde.

SIZE OF PROSPECTIVE CONSULTATION COMMITTEE

Mr. HYDE. Thank you, Mr. Chairman.

I wonder if I might presume on the two witnesses, who are superbly qualified and have made a great contribution to this very difficult subject, to impose on them some of my thoughts and notes that I have taken while I have been listening to what they said.

A consultation committee, that would—the minimum number would be 17. Then we would have three majority chairmen from the House and three from the Senate; then three ranking Members from the House and three from the Senate. There is 12. Plus four leaders plus the Speaker. We have a rather unwieldy group of 17.

The House Permanent Subcommittee on Intelligence, in theory, is supposed to be as nonpolitical as possible. In actuality, it is as highly politicized a committee as any in the House. I serve on it, and we vote party line votes right down the line routinely.

I just think when you have a President of one party and you have one Chamber or both Chambers of another party, it is very difficult to act in a nonpolitical fashion. I know if President Reagan is in the White House, I want him to have primary authority. If President Carter is in the White House, I want Congress to act as a restraining force. And that will always be; there is no way to avoid that.

NEED TO REDEFINE CONGRESSIONAL WAR POWERS

What I think Mr. Reveley has referred to this as a brilliant piece of legislation—I think it is a brilliant beginning, but I think what is needed is an updating of what war means, congressional power to declare war, what the Presidential powers as Commander in Chief mean, what the President's powers as having primary responsibility for foreign policy mean, and the concomitant use—need to use force as an implementing arm of that foreign policy.

I believe the notion that declarations of war are anachronistic and that we live now in an era of low intensity conflicts and subversion and terrorism, and that declarations of war may never occur again—and yet we will be in some states, some shooting situations, some states of belligerence—but because trading with the enemy, censorship, treason, all of those other laws get kicked in when that formal declaration of war occurs, it becomes perhaps a last resort and has lost its utility.

So, we need a body of scholarship to take a look at the Constitution, to take a look at legislation, and try to come up with more sophisticated approaches to what Congress' power is to declare war or a state of belligerency, what the President's powers are, as Commander in Chief, and as the person primarily responsible for foreign policy.

In that regard, we see that the President is the only one with a national constituency. The President, if he is formulating policy, provides a continuity. Our adversaries and friends know who to negotiate with. In the present situation, they must suffer from some terrible psychological uncertainties as to who to deal with on foreign policy.

Certainly, on arms control, if I were a negotiator, I don't know how much attention I would pay to Mr. Kampelman because we in Congress are disgorging suggestions day after day suggesting a comprehensive test ban, suggesting the President ought to do this or that. Our policies thus lack coherence and consistency.

We must bewilder our adversaries. Maybe I don't understand the psychology—confuse the enemy so they don't know who to deal with.

In war and peace and foreign policy, Congress clearly ought to be the partner with the President. The terms of that partnership have to be refined, it seems to me, brought into the modern era. How good a partner is Congress? How subject to political considerations which can overcome a policy that otherwise might be useful and even necessary? I think that is worth considering.

POLITICAL CONSIDERATIONS IN FOREIGN POLICYMAKING

I will cite a couple of examples that will drive some of my comrades up the wall. I think it is clear in the recent Saudi arms sale vote that political considerations overwhelmed what, to me—and I am speaking only for myself—is clearly the sensible thing to do in a world where Libya is intimidating Mubarak, intimidating everybody in the area, and attempting to intimidate us, in a world where Syria is rearming to the teeth, in a world where Iran is running amok and terrifying everybody—it would seem to me we ought to try to have one or two friends in the Arab world, among Islamic countries.

Same thing on Greece and Turkey. There are more Greeks in America than Turks. Any issue that comes up on Cyprus, I can bet you the ranch how it will come out, because of political reasons, not necessarily because of its wisdom.

Mr. SOLARZ. Will the gentleman yield?

Mr. HYDE. I will yield to my friend.

Mr. SOLARZ. I thank the gentleman for yielding.

Actually, I would like to think of myself as a supporter of the United States.

Mr. HYDE. That, too. That, too.

Mr. SOLARZ. The only point I want to make is that the Congress did lift the embargo against Turkey in spite of the ethnic realities which you alluded to. At the end of the day, the Congress acted the way it did because a majority of both the House and the Senate felt that it no longer served American interests to maintain the embargo.

Mr. HYDE. I am reassured the gentleman is telling me that politics do not influence the reasoned judgments of Congress, although I am happy to quote from Mr. Reveley's article in the American Bar Association publication where he says, "A third factor to keep in mind is that all humans, but Congressmen in particular"—and how right you are, sir—"like to avoid hard decisions if they can, to let someone else step out front and take the heat. Better to hang behind to see if the decision is going well or badly. If it goes well, then join it. If it goes badly, attack it."

You could have said all that with one word: Grenada. That is just what happened. The fulminations and expressions of outrage were many and colorful. When they went down there and saw how it worked out, there were a lot of people that jumped on the bandwagon.

PROBLEM OF LEAKS

Anyway, I think the leak problem—Mr. Solarz has said that the administration leaks more than Congress. He must have information that I don't have. Maybe it is because there are more people in the administration than there are in Congress. But this is an enormously serious problem. We can't keep a secret. We cannot keep a secret.

I have an article that I carry with me in my pocket: November 14, 1985, Washington Post, Daniel Schorr. He quotes a Member who is deceased now. "A member of the committee told me in an

interview that he could condone such a leak if it was the only way to block an ill-conceived operation."

Some people feel a moral duty to leak something to the press if they don't like it. The President is confronted with all of these problems and these realities.

NEED TO REDEFINE TERMS OF WAR POWERS RESOLUTION

How to deal with them is a serious problem. We need to consult. Consultation should mean more than mere notification. But the President knows that he cannot proceed with any undertaking involving combat without support from the majority of Congress. That is clear.

What the War Powers Act does is condense this, capsulize this, into some time limitations, rather than waiting for the next appropriation which he then can veto, and that sort of thing.

So, I think it is a great beginning, maybe even a brilliant beginning. But I think the distinctions between the Commander in Chief power, what the declaration of war means, who has primary responsibility for foreign policy, if anybody has, all of these things have yet to be resolved. I would hate to be in a shooting war, asking the court whether or not the War Powers Act is constitutional.

I wish we had advisory opinions at least on that one issue. If you can think of how to draft something that will get the court to give us an opinion on it, it might help.

Those are my thoughts. If anybody has any comments on what I have said—what is consultation, what is Congress in terms of who you have to talk to—I would appreciate it.

NEED FOR STRONG CONSULTATION PROVISION

Mr. Reveley. Mr. Hyde, you raise a lot of practical problems that are very real. They are inescapable in trying to deal with the war powers.

I sat at the Smithsonian, the Woodrow Wilson Center, for 10 months and tried to figure out how to define all the elements you mentioned in a workable fashion that most reasonable people would accept. What I kept discovering was that no such definition seemed possible. I became convinced that most reasonable people weren't going to agree on anything except the core elements. Everything else was the subject of vigorous disagreement. That is why I decided any war powers ought to focus on procedure. It ought to require executive-congressional consultation, followed by an opportunity for the President to begin the use of force if he thinks it essential, with Congress then having an immediate opportunity to review the President's initiative and limit or end it if Congress so willed.

I agree, if there were 17 people on a consultation committee, that would be unwieldy.

Mr. Hyde. Excuse me. We said 17. What about the Republican leadership? That is another four. Those are the four—the Speaker and the Republican leader, the majority leader and the whip?

Mr. Reveley. If we you can't get the committee with only 6 Members which would be ideal, in my judgment it is sufficiently

important to get a consultation committee going that we ought to take it with 17, 18, 19, 20, if that is what is required to get it started, and then fine-tune its size thereafter.

As to politics, I think Congress is more involved in the conduct of foreign affairs now than it traditionally has been. Indeed, many Congressmen seem to have their own individual foreign policies. The existence of the media, in particular, enables them to do so.

That wasn't nearly as true even 20 or 30 years ago. But the phenomenon is with us now for life. It is not going to go away.

I think that makes it all the more important that Congress be willing to delegate within itself to some of its own experts and leaders if it wants actually to consult with the President.

Mr. HYDE. Would you formally put in the legislation a consultation committee?

Mr. REVELEY. I would do it informally through the rules of the Senate and House.

Chairman FASCELL. Mr. Levine.

CONSIDERATIONS IN FOREIGN POLICYMAKING

Mr. LEVINE. Thank you, Mr. Chairman.

First, I would just like to make a couple of brief references to the points made by my distinguished colleague from Illinois, Mr. Hyde. It is always a distinct pleasure to hear him and listen to him, because there is no member of this committee, and probably no Member of this body, who is more eloquent, more thoughtful, and uses better reasoning in reaching his conclusions.

What I have always been astonished by is how such marvelous reasoning can yield such curious conclusions.

I do want to just make two brief points with regard to the comments the gentleman made, in particular with regard to his comments about the Saudi arms resolution.

I don't think this is the moment to debate it. We did do that a day or so ago. But I do think that it is questionable to conclude that when you have some 240 coauthors, a majority of Members on both sides of the aisle supporting this resolution in the absence of aggressive advocacy on this issue, that that result bears no relationship to the merits of the argument. And I can't help but observe that whether there is political involvement or not in the judgments that Members of Congress make, on foreign, on domestic policy issues, that is the price one pays for living in a democratic society and in a society in which people who make judgments on these issues are elected by their constituencies.

Obviously, we all factor in a variety of considerations in making our judgments. But one of the, I think, rewards of the form of government that we have is that the legislative branch will have the involvement that it does in political and legislative decisionmaking.

COMMENDATION OF WITNESSES

There are a couple of areas that the administration raised in its testimony with regard to the War Powers Act, in particular, that I would like to address to both Professor Cox and Professor Reveley. Before doing that, I also cannot help but comment, Professor Cox, that I was disappointed as a law student that I was not able to

have two professors of constitutional law. I had the great privilege of studying with Professor Freund, and therefore was unable to take your constitutional law course as well.

I don't know if you have managed to change the process now so that those of us who are forced with that choice can find a way of getting the best of both worlds, and have not just one constitutional law professor but two.

Mr. Cox. I think you made much the wiser choice. I also can't resist saying, with great regret, that we both have been put on the shelf.

Mr. LEVINE. Well, I have enjoyed for years listening to your testimony from a distance, and today at closer hand. I think you have made a number of enormous contributions to the country. I feel that today's testimony is very helpful to me, and I think to the rest of the committee, in a manner that is consistent with so much else you provided to the Congress and to the country.

Mr. HYDE. Would the gentleman yield on that point for a second?

I say this in all sincerity, Mr. Cox: I think it is one of the sad political facts or realities that you did not attain what I think you ought to have, and that is the U.S. Court of Appeals bench. I remember when you were talked about for that position, and it was only a question of age. And I think that is so unwise, because I think you would have been an ornament to that bench.

Even though I am sure we don't agree on a great deal, your scholarship and your ability would have been a great asset to that court.

I just want to agree that I think Archibald Cox would have been a great Mr. Justice.

Mr. Cox. Thank you.

APPLICABILITY OF WAR POWERS RESOLUTION TO COUNTERTERRORIST ACTIVITIES

Mr. LEVINE. There are a number of areas Mr. Hyde and I find ourselves increasingly in agreement on.

Yesterday, Professors Cox and Reveley, the administration—or the day before yesterday, the administration, in its testimony, in trying to determine the applicability of war powers to current situations, moved into two areas that are difficult, but where the thrust of the administration's testimony troubled me. You have touched upon each of them.

I would just like to ask you if you could elaborate further on both of these areas. First, the administration seemed to be suggesting that there ought to be a distinction in areas of counterterrorist military activity in the context of the War Powers Act from other areas.

If I understood the State Department's testimony correctly, I think that the State Department suggested that because of both the secrecy and the potential immediacy or eminence in terms of a response to terrorist activity, the War Powers Act was uniquely inapplicable or at least less applicable to those circumstances. And the State Department counsel suggested that perhaps there ought to be an exemption or at least a different form of dealing with ter-

rorist activity from the way in which we deal with other forms of military responses.

So, first I would be interested in that area, in order to put all the areas on the table now and let you respond instead of going back and forth.

LEVEL OF MILITARY ACTIVITY REQUIRING CONSULTATION

Another area that was difficult, there is the whole question of at what level of military involvement is Congress to be consulted in the context of the War Powers Act? One point that was made by the State Department representatives was that in the entire history of the country, we only declared war three times; but we have had some 200 military activities.

My understanding of the warmaking power in article 1, section 8, is that it is not limited simply to formal declarations of war, although the language is to declare war; but nobody has discussed the history of that article, of that section of article 1, in the context of the debates, at least in these hearings.

I would be interested in your interpretation as to what the threshold would be, what the level would be at which there is a congressional constitutional mandate on the one hand, and a necessity for congressional involvement on the other hand, in the context of military activity that is somewhere short of an actual declaration of war.

It seemed to me that the State Department was suggesting that in those circumstances where military activity does not rise to the level of a formal declaration of war, congressional involvement need not be as extensive or as formal as it would be in the form of an actual declaration of war. I am troubled by that suggestion because of my perception that that will reduce the importance of the legislative branch, which I felt in my understanding of the Constitution was preeminent in that involvement of the United States in actual military activity.

Those are the two areas I would be concerned about your responses to.

Mr. Cox. Let me say, if I may respond directly and start with the latter—and I do thank you again for your generous words—the traditional occupant of the State Department, and sometimes of other advisors to the President, has been to point to the long series of events in history to which you accurately refer, and then to argue that this shows that the President, as Commander in Chief, has the irreducible power to do these things. That was the argument that the Legal Adviser followed, essentially, as I read his testimony, or at least saw a summary of it.

I think that that is mistaken. It rests on a fallacy, and the fallacy that the Congress rejected in 1973. With congressional silence, with congressional acquiescence, in the absence of congressional action, the President may well have those powers. He did exercise them, unquestionably.

There are some things that he can do that he has no irretrievable right to do, that Congress may restrict and regulate, not only in elaborating and clarifying its powers to declare war, but perhaps even more particularly under the necessary and proper clause

which enables it to regulate the entire conduct of the Government in ways "necessary and proper."

I see the War Powers Resolution as such a restriction and as one that it would be very hard to improve, except in the matter of consultation.

So, that is my response to the first point.

DISTINCTIONS IN LEVELS OF HOSTILITIES

As to the second, I chose my words more carefully in my written statement. I will not take the time to read it. I think there is a line that can be and should be drawn, even though it is not always right and precise, between use of military, in a broad sense, to deal with individual terrorists, to deal with armed bands of terrorists, where there is no attack upon, no use of the Armed Forces against, a foreign government, de facto or de jure, and where there is no likelihood of resistance by such a government.

Some of the things that the Legal Adviser spoke of would be relatively small things like the forcing down of the Egyptian airplane that was believed to be carrying two terrorists. If his statement was restricted, as I have stated, I would not greatly disagree with him.

Of course, then he spilled over into treating as equivalent to those incidents, relatively little incidents, the attack on Libya, the introduction of the Armed Forces into situations where hostilities are imminent. And I would say those are two very different things.

I might go on and volunteer another comment on his testimony. I was aghast to read the Legal Adviser invoking appropriations acts to say that the Congress had approved everything that the administration has done using that money. This is Vietnam all over again. This is the kind. Remember, one of the purposes of the War Powers Resolution was to avoid the division in the Nation that resulted from the executive action and its forced interpretation of congressional action. That is what we are trying to avoid, all of us.

Mr. LEVINE. If I might comment briefly.

First, I thank you for your response.

Second, I appreciate your addendum at the end.

My time has expired.

In my colloquy with Mr. Sofaer, I wanted specifically to put that on the record, as well. Appropriating money for a particular weapon or weapons system does not automatically lead to the conclusion that you approve of a particular use of it. I am pleased that you mentioned that, and that it is on the record. It was a highly creative argument, to say the least.

Chairman FASCELL. Mr. Berman.

EXECUTIVE COMPLIANCE WITH WAR POWERS RESOLUTION

Mr. BERMAN. Thank you, Mr. Chairman.

With respect to that last point reading his testimony, I was quite alarmed at that suggestion. But in response to a question I asked, it seemed to me he moved off of that point, or at least put it into a context that implied the administration had complied with the War Powers Resolution with respect to this specific incident; second, that there have been x number of hundred uses of force by

the United States in the past, only three of which have been preceded by a declaration of war initiated by Congress.

And I missed both of your testimonies. I plan to read them later. So, you may have all addressed this very specifically.

There was a more generalized statement by Congress of the need to create, for instance, an antiterrorism unit—not that that was a substitute for the constitutional or legislative specifics.

Maybe I read too much into his verbal response to those questions; but it seemed like he was creating a different impression from that given in his written testimony.

I will forego any questions at this time, Mr. Chairman.

Chairman FASCELL. I haven't heard anybody yet in these 13 years of discussion arguing that the reference in the Constitution to the role of the Congress with respect to committing the Armed Forces of the United States into hostilities is meaningless.

I gather you gentlemen are testifying that you support the general theory that the Constitution has some meaning?

Mr. COX. You are quite right.

EXERCISE OF MILITARY FORCE UNDER THE CONSTITUTION

Chairman FASCELL. Still, going back to square one, since the beginning, the issue has arisen with respect to the powers and the responsibilities of the President and the powers and the responsibilities of Congress with respect to the use of Armed Forces.

We have throughout our history made decisions in this country as to what might be considered legal exceptions to the pure interpretation of the exercise of military power under the Constitution.

Do you gentlemen agree with that statement?

Mr. REVELEY. I believe I do, Mr. Chairman.

When you look at the language of the Constitution against the background of what the framers and ratifiers actually said and seemed to intend, what emerges is a belief that Congress should approve in advance virtually any American use of force against another state, even if the force is relatively minor, except when the United States itself is suddenly attached.

I think one reason the framers and ratifiers so intended was that they did not expect the United States would have either the capacity or the need to use force against other states.

Be that as it may, the declaration of war clause was meant to cover any use of force, even minor ones, against another state. The clause contemplates that Congress will be involved before the fact unless there is no way to involve Congress—it isn't in session; it can't be brought together quickly enough; or in particular, an attack is ongoing against U.S. territory.

In that event, the change during the constitutional convention from Congress' power to "make" war to its power to "declare" war indicated, when you read the legislative history, that the President is free to respond on his own authority.

Interestingly, the only pertinent reference in the Constitution says that the states may respond to sudden attack without the prior blessing of Congress.

So, yes, we have departed from the original understanding in this regard. But the departure began during Washington's adminis-

tration, and the departure has gone on without much interruption ever since. I think it is now a pretty firm constitutional practice.

ADHERENCE TO THE CONSTITUTIONAL PROCESS

Chairman FASCELL. In the normal course of events, in the 30-some years I have been here, I have heard every President, every Secretary of State, and I think almost every Secretary of Defense, at one time or another, try to eliminate the need for Congress to be involved in anything except providing the money to do whatever it is the administration wants to do.

A lot of people wish to change the system. I am not one of them. I think that the country generally agrees with that, because we have managed to live under the Constitution with all of the warts, blemishes, and problems that arise in practical day-to-day operations. We rely on common sense to resolve those problems—we don't resolve them by going to the Supreme Court to make a decision in every case. As a matter of fact, I hope this issue never gets to the Supreme Court.

Now, let's go back again to the gray areas where you don't have the old-fashioned type of declaration of war, for example, Pearl Harbor. Instead, there are situations where we go into war piecemeal, and therefore we must try to devise some method whereby Congress has some input before the fact instead of after the fact. Therefore, you come up with the War Powers Resolution.

It is an effort to institutionalize that process without creating a constitutional problem. So, we are agreed, are we not, that the War Powers Resolution cannot possibly change the Constitution—the definitions, the acceptances, and the practices that we have are not changed in any way. They are still there.

Mr. REVELEY. I agree with you, Mr. Chairman. I think if Congress tried to change the Constitution in the War Powers Resolution, that would not be constitutional.

Chairman FASCELL. It is so clear.

Mr. REVELEY. The President might try, but it would not be constitutional.

INTERPRETATION OF WAR POWERS UNDER THE CONSTITUTION

Chairman FASCELL. Agreed.

So, we are still left with the same problem, which is how do we interpret the Constitution—not in the legal sense, but in the practical sense—because scenarios will change.

Let's look at this problem for a moment. We had a statement, a declaration by the President of the United States, with respect to the use of force in the Libyan case; and it was, as far as I am concerned, a new pronouncement on the theory of the use of force.

In actual fact, first by the physical act of the attack on Libya; second, by the President's statement of April 14 when he expanded upon that and said that, in effect, the action was not an act of war but an act of self-defense, and he relied on international law to justify the action rather than the Constitution. He then went on to say, "I will exercise that right, that power to commit the sovereignty and the Armed Forces of the United States anywhere in the

world any time I see fit, if it is connected with an individual, a group, or state-supported terrorism."

In other words, "I will attack another state, just like the United States attacked Libya, if I think it is essential either under the construction of self-defense, saving American lives, or punishing terrorism, or whatever other construction I want to give it."[1]

Now, I am concerned about strict constructionists of the Constitution who would say that in the abscence of a formal declaration of war, committing the Armed Forces of the United States in an attack on another country is not an act of war. However, it seems to me that if you invade the air space, the sea space, or the territory of another country, you are committing an act of war. Would you agree?

Mr. REVELEY. Yes, for American constitutional purposes.

Chairman FASCELL. Do you agree?

Mr. COX. Yes.

Chairman FASCELL. Now we are about to change that concept because of modern times. We have a President in office who is not afraid to use power and take his chances. But it doesn't help us with the constitutional problems, does it?

Mr. REVELEY. Truman said much the same thing when he went into Korea. Woodrow Wilson said much the same thing when he went into various Caribbean states.

It is a notion Presidents have advanced from time to time. If they are enforcing international law, acting in self-defense, implementing treaties, then that justifies their unilateral resort to the use of American force. But, in my judgment, this notion is not well rooted in the Constitution. When we us force against another state, congressional involvement is essential. The question is, to structure Congress' involvement in the process of deciding whether to use force?

CONGRESS SHOULD ASSERT ITS CONSTITUTIONAL RESPONSIBILITY

Chairman FASCELL. So, now we have established the boundaries of the problem, which is: What do we do in this process where the President has already made a pronouncement? Whether it is an arrogation of new power or the restatement of an old power is really immaterial.

The question is: How do we solve the constitutional problem? It is a very difficult question.

Mr. COX. I think you address the constitutional problem and hope to make progress in resolving it by making clear, as the late Senator Javits called on the Congress to do, that the Congress is committed, and faults violations of the Constitution as declared and implemented in the War Powers Resolution. You cover the constitutional problem by this, plus some strengthening of the consultation requirement, so that one cannot come up with arguments that all it means is notification—can't come up with, "We didn't know who to consult"—are no longer possible. That, too, would state the position of the Congress, would be consistent with the clear intent of the Constitution as recited over and over again by a

---

[1] The complete text of President Reagan's statement of Apr. 14, 1986, appears in app. 3.

prominent man in framing it—Jefferson, Madison, Hamilton, several Justices of the Supreme Court who had been at the Constitutional Convention, and so forth.

That may not be enough, but it at least is something that can and should be done.

NEED TO STRENGTHEN CONSULTATION PROVISION

Mr. REVELEY. I would do two things. As Mr. Cox just indicated, first say that the President's reading of the Constitution is wrong on that particular point. He is wrong, just as Truman was wrong, Wilson was wrong, and a number of others were wrong.

Second, as we discussed before, I would put some teeth in the War Powers Resolution's consultation provision. If teeth aren't put there, all you are going to be able to do as a practical matter is say the President is wrong, complain, and occasionally—when the sense of the country turns against a particular use of force—get majorities in both Houses to take steps to curb or stop it.

Chairman FASCELL. Sure, but that is only after the fact.

Mr. REVELEY. Section 3, in my judgment, is the only practical, before-the-fact hope.

Chairman FASCELL. I agree. There is no question about it.

WAR POWERS RESOLUTION CLARIFIES CONSTITUTIONAL RESPONSIBILITY OF CONGRESS

Mr. COX. Mr. Chairman, may I be academic for a moment?

I think that there is an important distinction, one essential in maintaining the role of Congress in the separation of power between, as I said before, what the President may do when Congress has been altogether silent and has provided no instructions as to the way his powers may be executed and what the President can do when Congress has spoken and put the restrictions on those powers.

Now, here, when Congress has spoken in the War Powers Resolution, I think the essential ground to maintain is what is said there about the constitutional allocation, as clarified and implemented by the War Powers Act. I think that is important in the debate, even though it sounds a little academic. For the academic quality, I apologize.

Mr. REVELEY. I think that is an important observation. Perhaps another way of stating it—this may be a different notion—is that Congress under the necessary and proper clause may specify the procedures by which the President and Congress are to implement their constitutional war powers, whatever those war powers may be, and that Congress does have clear constitutional authority to define those procedures, and it has done so.

Those procedures say consult first; then the President, if he wishes, may act. Then Congress has an opportunity to review, modify, or terminate. That is the procedural scheme.

I don't think on substantive constitutional grounds—war powers grounds—that this procedural scheme is very easy to challenge.

CONSTITUTIONALITY OF WAR POWERS RESOLUTION

Mr. HYDE. Will the gentleman yield?

Chairman FASCELL. Certainly.

Mr. HYDE. Just a couple of comments.

The Chairman has said that he would not like the court to adjudicate the constitutionality of the War Powers Resolution. I just don't share that view, because we are constantly accusing any President when we don't like what he has done as violating the law. If it isn't a law, if it isn't constitutional, we ought to know. I think we would be on firmer ground knowing that what we are doing is constitutional.

Chairman FASCELL. Will the gentleman yield?

Mr. HYDE. Sure.

Chairman FASCELL. The trouble with that, you see, is we would be right back where we were when we started. You have these gray areas under the interpretation of a constitutional authority. What you are saying, in effect, is, let the President use the power any way he sees fit because you can't challenge his constitutional right to use that power.

Mr. HYDE. No. I want to challenge it. I want to figure a way to get this to the court.

Chairman FASCELL. Get the President into court?

Mr. HYDE. Yes. Get this law in.

Chairman FASCELL. It seems you are saying that we have the Constitution, but you don't like that. That it is anachronistic.

Mr. HYDE. I didn't say the Constitution was anachronistic.

WAR POWERS AND LOW INTENSITY CONFLICT

Chairman FASCELL. You said a declaration of war was anachronistic.

Mr. HYDE. I am saying it is not designed to deal with today's world in terms of low-intensity conflict, subversion, revolution, and that sort of thing.

Chairman FASCELL. Henry, I agree with all of that. All I said was, we are faced with the same problem we have had since the founding of our Nation—whenever the Executive first used military power without a declaration of war.

Mr. HYDE. Let me also suggest that we can improve the resolution as we have it now by defining who we mean by Congress. I think the leaders, minority and majority, of both Chambers at least ought to be within that definition, and as many others as can practicably be consulted.

Then we ought to define what we mean by "consult." It is mere notification? Or at the other extreme, is it advise and consent? It is clearly not the latter. It ought to be more than the former.

If we can formulate a consultation where there is some interchange, I think we would improve the law.

Lastly—and I appreciate you yielding—I have an Alexander Hamilton quote from the Federalist No. 23. He says, "The circumstances that endanger the safety of nations are infinite. For this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed."

I think he was talking about the President then, and not Congress.

Chairman FASCELL. Only trouble is, the Founding Fathers put another provision in the Constitution that says Congress shall declare war when the country is going to go to war.

Mr. HYDE. I am all for that. We just don't declare war any more.

Mr. REVELEY. We have had low-intensity conflicts since the beginning. Low-intensity conflicts have been with us since George Washington's administration.

EXECUTIVE ASSERTION OF RIGHT TO PROTECT AMERICAN CITIZENS

Chairman FASCELL. Let's take another exception—the right to protect American citizens. That was a theory under which we went into Grenada and it was generally accepted.

It was generally accepted because it was successful and it was short run. But, nevertheless, the theory, the legal theory behind the action, was that we went in there to protect American lives.

Now, according to the President, we have a new legal theory that we not only have a right to act in self-defense under international law, but we also have a right to save American lives before they are lost, in the event of an act of state-supported terrorism that justifies the use of force.

Now, I support that in the Libyan case. I don't know about the next case.

I didn't mean to interrupt you.

ALEXANDER HAMILTON ON RESTRICTION OF EXECUTIVE WAR POWERS

Mr. COX. No. I am sorry, but the reference to Alexander Hamilton brought to my mind, I think, a somewhat more precise statement of Alexander Hamilton on this point. He refers to the provision that the President is to be Commander in Chief of the Army, the Navy of the United States.

> In this respect, his authority would nominally be the same as that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the Supreme command and direction of the military and naval forces as First General and Admiral of the Confederacy, while that of the British King extends to the declaring of war and to the raising and regulating of fleets and commerce, all of which, by the Constitution, would pertain to the legislature.

AMBIGUITIES IN WAR POWERS RESOLUTION

Mr. REVELEY. This exchange suggests one of the major problems in unraveling the mysteries of the war powers. On any given day, from any given person, you can get a quote going one way or the other. The same great Americans have often changed their minds over time.

Senator Fulbright, in our experience, changed his mind over time as to the basic constitutional prerogatives of the President and Congress.

It is essential that war powers questions be looked at in context, taking into account all of the bits and pieces of precedent.

The reality is, I think, that you can't insist on having the prior approval of Congress before the President acts to combat state-supported terrorism, or much of anything else. But, on the other hand,

the reality remains that Congress must be involved somehow in American use of force decisions.

Congress' job, those in it who are interested in the subject and are willing to deal with it, is to figure out the "somehow."

FEAR OF LEAKS SHOULD NOT PREVENT CONSULTATION

Chairman FASCELL. Let's go to that question for a moment. I have heard the argument ad nauseum about leaks and security.

Let me point out the Joint Atomic Energy Committee, which had 19 people on it, served from 1949 to 1977 under the kind of conditions that would be envisioned for a congressional consultation committee. In other words, a very small staff, highly capable, all kinds of security provisions involved, both with respect to materials and the conduct of its own hearings, et cetera. So, it is possible to have that kind of capability in the Congress of the United States with a minimum threat to security, although we should always be concerned about that.

Numbers, I am not too worried about, frankly. We have had estimates of anywhere from 75 people to 2,700 people being involved in the single security decision on the administration's side. It boggles the mind to think how many people have to be involved in a secret operation within the administration, even when personnel are restricted to the highest security level and when the President threatens to cut the throat of anyone who leaks information.

CONSULTATION VITAL TO DEMOCRATIC SYSTEM OF GOVERNMENT

When you consider the numbers involved on the administration's side, as against the numbers that would be involved on the congressional side, it would seem to be a situation of manageable proportions. This is not just a matter of those sterile constitutional questions, but what is or ought to be, under a democratic system, a very important public policy matter. In other words, when you are going to go to war, regardless of whether it is against a single terrorist or another country, and you are going to use force, you need to have the broad support of both branches of government—that is the public policy involved.

What both the administration needs to do—and I don't mean just this one—and the Congress, is to work as diligently as we can in order to satisfy that very fundamental principle, which we deem vital to the conduct of a democratic society and important enough to incorporate into the Constitution of the United States.

CLAIM TO RIGHT OF PRIOR APPROVAL

Mr. REVELEY. Mr. Chairman, may I raise one concern I have, notwithstanding my strong support for this consultation committee? That is, I think it would run quickly onto the rocks if any members of it took the position that as a political or constitutional——

Chairman FASCELL. They had the right of prior approval?

Mr. REVELEY. They had the right of prior approval. And if they didn't like the President's decision, they would go public.

Chairman FASCELL. Well, we have statutory rules against the disclosure of classified material. There are a lot of ways to handle that.

INTENT OF CONSULTATION PROVISION

In any event, let's get to that question of consultation. The committee report on the War Powers Resolution makes it very clear what the Congress was talking about, at least on the House side. I can say with assurance, since I was one of the original drafters of that legislation and the concept of war powers. We knew exactly what we were talking about in terms of consultation. The problem is convincing the administration, any administration, what we are talking about.

For example, when we were called down to the White House on the most recent Libyan strike at 4 o'clock the same day, the President was obviously covering several bases at the same time. One was the reality of having to work with the Congress. The other was to eliminate or mitigate as much as possible any criticism with respect to war powers.

But the fact is that we were brought down there. We were informed that a decision had been made. Then we were given the battle plans.

Well, I can state that, as one Member of Congress, I am not interested in the battle plan. I don't care whether we use two carriers, ten carriers, or forty airplanes, what time they took off, what time they expect to land, what they expect to do and to whom. That is not the issue that the War Powers Resolution addresses.

The issue is, one, what is the problem; two, what options are available to you, from A to Z; three, gentlemen of the Congress, what do you think we ought to do, what is your opinion? The President doesn't have to divulge every detail, but he at least has consulted with the Congress.

CONSULTATION OR ANTITERRORISM POLICY ESSENTIAL

And why is this discussion extremely vital? Because the President has already served notice on the American people and the world that he will once again use force in order to deal with state-supported terrorism, no matter where or when it occurs. We have notice. Now, should Congress sit idly by? Or, should there be a round of consultation with respect to exactly what it is we are talking about, and how far we want to go—do you intend to go to the source? And what if the source is Moscow?

STATEMENT BY SENATORS AFTER BRIEFING ON LIBYAN STRIKE

Mr. HYDE. Would the gentleman yield?

In putting this mosaic together, would you include the fact that even under these constricted circumstances, but before our aircraft went in for the strike, probably two Senators—at least one—and there is a dispute, when interviewed by the press upon leaving the White House, said watch the President on television at 9 o'clock—now, that was precisely what I think the White House was concerned about, because the planes weren't in there yet. The papers

had been full of speculation on whether we were going to hit Libya, and they said watch the President at 9 o'clock.

I think you have to consider that in evaluating——

PREEMINENCE OF CONSTITUTION

Chairman FASCELL. But I would point out, Henry, that unfortunately the notice had already gone out to the White House press corps that the President was going to speak at 9 o'clock, and they commandeered all the networks for that purpose.

I didn't like the Senators saying what they did, either. But you have to be reasonably fair about this.

I want to get back to the question of the application of international law as opposed to the Constitution of the United States. The question, I think, is simply: Does Article 51 of the United Nation Charter, or any other international treaty, either circumvent, modify, amend, or repeal the Constitution of the United States?

Mr. COX. No.

Mr. REVELEY. No.

Mr. BERMAN. Would you yield, Mr. Chairman?

Chairman FASCELL. I want to be sure to get their answers in the record. Both of our witnesses said no. Mr. Berman.

THE CONSTITUTION AND TREATY OBLIGATIONS

Mr. BERMAN. To what extent does that reduce or dilute or change the meaning of the words of a treaty, say, a NATO treaty, with respect to the obligation of the United States under certain situations to come to the defense of other countries with whom we are in a treaty alliance? Can you have such treaties ratified by the U.S. Senate and still have meaning to the Constitution, giving to Congress the power to declare war?

Mr. REVELEY. I think the questions are, can you, by treaty—assuming only Senate concurrence—commit the country to use force, or do you have to have joint congressional/senatorial consent to any such international undertaking? Do you have to involve the House? That is the first question.

The second question is, can Congress commit the country to use force upon the happening of some future event—upon a contingency? The answer, as far as I am concerned, is, if both the Senate and the House, in a measure agreed to by the President, commit the country to use force upon the happening of some fairly specific future event that is constitutional.

Mr. BERMAN. These treaties haven't been ratified by both the Senate and the House?

Mr. REVELEY. There is a question whether you can do it with just the President and the Senate. I think the Constitution's framers and ratifiers were more comfortable leaving things with to President and Senate than we are today.

Mr. COX. My understanding is that the typical reading of a treaty that imposes obligations upon a nation is that it is always—commits itself to act in accordance with its constitutional processes, and that the treaties, therefore, do not have the effect of changing the Constitution or of committing anything more than the Constitution permits.

Mr. BERMAN. Does Congress have an obligation to respond to a decision—made by a President and ratified by a Senate some years earlier—with respect to that treaty obligation? In other words, my ability to make an independent judgment of whether I should vote for a declaration of war must be constrained by my understanding of treaty obligations this country has already entered into?

Mr. COX. One of the things that the Congress surely should take into account is any commitment, whether there have been changes of circumstances that affect that commitment, but I don't think it is something to be totally disregarded, no.

Mr. REVELEY. But it is a question of international law and American foreign policy as to whether Congress reneges on a commitment made 10 years before. Congress may constitutionally renege.

Mr. BERMAN. You are saying every one of our treaty obligations should have a caveat making clear to every country that enters into it, that it is subject to the constitutional processes, including——

Mr. REVELEY. I think that is in effect read into all of them. If the United States violates one of its treaties, it has a problem with international law, although it may have violated it in a fashion that comports with domestic constitutional law.

Mr. BERMAN. I wonder if it has any more of a problem than it has when it violates the War Powers Resolution?

SIGNIFICANCE OF CONGRESSIONAL APPROPRIATION OF FUNDS

Chairman FASCELL. Gentlemen, I want to thank you very much. We have a lot of questions. We may want to submit some to you for responses for the record, if that is all right.

For example, I have in mind the question of the United States already involved in hostilities, but not having declared war, and the Congress, after such action has taken place, provides $700 million for the further conduct of that hostility.

What does that mean, in terms of congressional approval, other than the fact that we gave the President the money?

CONGRESSIONAL DELEGATION OF POWER TO ENGAGE IN HOSTILITIES

The other question is instances where the Congress, by law or by resolution, delegates to the President the authority to conduct hostilities in any way he sees fit for the purposes set forth in that resolution—to wit, the Gulf of Tonkin, or deployment of the multinational force in Lebanon.

Just exactly what does that mean in terms of the constitutional requirements?

There may be others, and I think while we are at it, we might as well try to explore all the issues here and see if we can't contribute not only to the body of knowledge and law, but also to the practical problems that confront us. We must keep in mind that what we are talking about is a critical issue, which is how does or how should the United States commit its manpower and its sovereignty to hostile actions with other governments or other people?

Gentlemen, thank you very much for the thought and the attention you have given this issue and the time you spent with us today.

The subcommittee stands adjourned subject to the call of the Chair.

[The following summary of the preceding hearing was submitted at the request of Chairman Fascell:]

STATE-SPONSORED TERRORISM AND COMPLIANCE WITH
THE WAR POWERS RESOLUTION: SUMMARY (2)

On Thursday, May 1, 1986, the House Committee on Foreign Affairs conducted its second day of public hearings on War Powers, Libya, and State-Sponsored Terrorism with the testimony of two legal scholars: Archibald Cox, Carl N. Loeb, University Professor Emeritus, Harvard University, and Chairman, Common Cause, and W. Taylor Reveley III, Attorney, Hunton and Williams.

Chairman Dante B. Fascell called the hearing to order at 9:43 and restated that the purpose of the inquiry was not simply to oversight the relevance of the War Powers Resolution to recent U.S.-Libyan confrontations but to redeem the former's promise in restoring the Legislative-Executive balance in decisions involving hostilities, particularly low level hostilities aimed at deterring or countering terrorist attacks. He renewed his plea for meaningful consultation between the political branches and encouraged the witnesses to consider how this goal might be significantly advanced.

He noted the longstanding nature of the debate and, in welcoming the assistance of Mr. Cox and Mr. Reveley "through the thicket", the Chairman expressed the hope that the Congressional-Executive dialogue would never end.

Mr. Archibald Cox stated that it was the wish of all Americans that their government be alert to the dangers of terrorists and sponsors of terrorism. At the same time, he hoped that neither the fear of terrorism nor our sense of outrage at terrorist acts impel the Nation to upset the constitutional allocation of war-making powers implemented by the War Powers Resolution.

He urged "careful, sober, and informed" inquiry into two related questions:

"1. Does the urgent need for effective action to prevent, punish and deter terrorism require modification of the War Powers Resolution?"

"2. Can and should the War Powers Resolution be improved and strengthened so as to assure that the United States is not committed to armed hostilities that may lead to war, without the full participation of the people of the United States through their representatives in Congress?"

His approach to these questions was premised on the conviction that the allocation of power between the Congress and the Executive defined by the War Powers Resolution "is both constitutional and wise." In its support Mr. Cox quoted from the Framers, The Federalist Papers, and Supreme Court decisions to the effect that the Constitution vested all power to make war in Congress and as Commander-in-Chief the President has command of the troops and a limited power to repel a sudden attack upon the United States.

The argument in support of the assertion of broader executive authority according to Mr. Cox, rested upon a misconception. He acknowledged that Presidents for many years did in fact exercise broader authority but these exercises took place with tacit acquiescence by Congress and in the absence of any statutory regulation. This legislative void was filled and, thus the situation was altered by the enactment of the War Powers Resolution.

Turning to the first question regarding the need to tailor the War Powers Resolution to cope with terrorism, Mr. Cox indicated that the law as it stands has sufficient flexibility for that purpose. Conversely, the law contains few restrictions and these were not unreasonable.

There are only two restrictions on presidential action, one absolute and one relative. In the first category, the President may not initiate a war, even on a country that supports terrorism, without a declaration of war by Congress. The other advance restriction was the requirement in section 3 of the War Powers Resolution that required the President to consult Congress in every possible instance before engaging in hostilities, actual or potential. According to Mr. Cox, the second restriction left considerable room for using without prior consultation small military units against terrorists where there is no attack upon a government and there is no indication that a government will resist these counter-terrorist measures. (E.g. The use of the U.S. Air Force to intercept and force the landing of an Egyptian airplane believed to carry the terrorists responsible for the hijacking of the Achille Lauro cruise ship.)

Leaving the matter of consultation aside for the moment, Mr. Cox concluded that neither the law's reporting nor 60-90 days termination features impaired the President's flexibility to respond to terrorism. "If more than 60 days of foreign operations is required, the magnitude of the operation deserves a Congressional vote for continuance."

Another course available to the President is to seek specific statutory authorization to use the U.S. Armed Forces against a specific country or countries supporting terrorism, for a specific period of time. (E.g. The Lebanon peacekeeping resolution). The exercise of care in drafting a resolution of this kind would eliminate the unfortunate consequences of the Gulf of Tonkin Resolution of 1964.

On the other hand, pending legislation which would grant broad authority to the President to use the Armed Forces of the United States

to counter terrorism is in Mr. Cox's "judgment, an unnecessary, rash and highly dangerous over-reaction." It "would supersede the War Powers Resolution" and conceivably could be justification" to punish or topple "a half dozen regimes. "We of Common Cause", he declared, "sincerely hope that this Committee and the Congress will reject any such legislation."

Turning to the question of possible reform of the War Powers Resolution, Mr. Cox focused his attention on the consultation provision which he felt was "plainly" violated in spirit and very likely in fact by the bombing of Libyan military installations without prior consultation with representative congressional leaders. That action met one or the other triggering criterion of the law.

Relying on legislative history, Mr. Cox indicated that consultation was intended to mean the seeking of advice, not simply the one-way conveyance of information. Although, Mr. Cox was persuaded that the object of the intended consultation was with a representative number of leaders rather than the entire Congress, he suggested that the Committee consider a clarifying amendment along these lines. The fear that congressional leaks might compromise the security of military operations could be reduced by keeping the group's numbers down.

In addition to consulting on specific operations, Mr Cox called for ongoing informal consultation to develop a pattern of behavior and a spirit of mutual cooperation.

Other reforms suggested by Mr. Cox included incorporating into the law the definition of consultation found in the House Committee Report of 1973 and replacing the apparently defective concurrent resolution that allows Congress to cut short hostilities. The latter could be accomplished in either of two ways: substituting a joint resolution for a concurrent

resolution (the former requires presentment to the President) or shortening from 60 to 30 days the period for which the President may use the Armed Forces without a declaration or other law authorizing warmaking grant of power.

Mr. Cox noted that reticence in certain quarters to congressional involement in the decisions to use the Armed Forces and grudging Executive compliance with the law make it incumbent upon Congress to express its commitment to the War Powers Resolution and its right to share in decisions that can lead to war. More than the War Powers Resolution was at stake; at risk was "the system of checks and balances that for nearly two hundred years has kept our Nation free and preserved our people's liberties." Accordingly, "it is now up to the Congress ... to reconfirm and exercise its constitutional responsibility ..."

Mr. Reveley paid tribute to the Committee for seeking to restore the constitutional balance between Congress and the President in matters of war and hostilities. In highlighting the difficulty of the task he noted his own twenty-year struggle to master the subject's mysteries -- but that mastery is vital if the blueprint of government established by the Framers is to be maintained.

At the outset, Mr. Reveley expressed a number of conclusions regarding the relationship of the War Powers Resolution to the current spate of terrorists acts that triggered the current inquiry.

First, state-sponsored terrorism does not involve any new development which makes the law's application dubious or problematical.

Second, the law's relevance and continued vitality rest on consultation.

Third, Congress must insist on consultation if it is going to assert its Constitutional rights respecting war.

Fourth, if Congress is going to insist on consultation, it has to establish a reasonable agency to carry out consultations.

Mr. Reveley said that current arguments in support of allowing the President to act unilaterally in these matters are as old as the Presidency itself. However, the Congressional role in the use of force is deeply rooted in the Constitution regardless that the force applied may be speedy or trivial. The fact of state-sponsored terrorism does not call for modification or alteration of the constitutional design or any significant change in the War Powers Resolution. The law provides the best mechanism for mutual cooperation in an area of mutual responsibilities.

Critics of the law confound us with a Catch 22 irony, he said. One side decries it because it does not require Congressional approval in advance of war; the other side because it does contrary to broad assertions in behalf of Presidential powers. The Resolution's supporters contend that consultation with Congress is too little and too late and usually consists of mere notice of imminent action. The Resolutions' detractors respond that Congress is not around and not interested in consultation or irresponsible insofar as maintaining secrecy is concerned.

Contrary to its critics, Mr. Reveley declared his faith in the law and indicated that it possessed the potential to embody an emerging constitutional consensus. The law "mated [the interest of] both [political] streams", a condition necessary to make action legitimate. It took into account 200 years of experience by getting Congress involved and permitting the President to use force unless barred by Congress.

The mechanisms for Congressional involvement is in the War Powers Resolution's consultation and reporting provisions. If these requirements were complied with, the law would operate to everyone's benefit. In particular, serious regard by both branches for the consultation feature is the only way Congress has to participate in the quick use of surgical force.

Mr. Reveley felt that for various reasons the President would not volunteer to make the law workable and that it was up to Congress to persuade and cajole him to that end. One way to obtain cooperation is by creating a committee comprised of persons whose expertise, prestige and power would ensure meaningful consultation. It should meet five criteria: it should be a joint committee; its membership and staff should be kept small; it should be comprised of senior members; its members and staff should consist of experts on foreign and military affairs and intelligence matters; it should operate quickly and secretly.

Mr. Reveley counseled that a consultative committee to be fully effective should not sit around waiting to be consulted on a specific operation or policy but rather should meet regularly to consider information on potential hot spots, meet often with its executive counterparts to keep current, and consult during the decision-making process, giving advice along the lines of the original conception of the Senate as a Privy Council on treaty matters.

Possible and likely candidates for membership on the consultative committee include the leadership of the House and Senate and Chairmen and ranking members of their respective Armed Services, Foreign Affairs, Foreign Relations, and Intelligence Committees.

Aware that joint committees are currently out of fashion on Capitol Hill, Mr. Reveley nevertheless felt that the combined and integrated structure had the advantages of unity and common purpose that would give it equal footing with the Executive.

Mr. Reveley wound up his formal presentation by observing that whether or not Congress created a consultative group, the War Powers Resolution is "what you've got" but that its promise will not be realized until its consultation requirement "has teeth".

In the question/answer period that followed, a consensus seem to emerge between the members and the witnesses on the high points of the latter's testimony, particularly on the merits of ensuring consultation by setting up a Congressional agency for that purpose. Mr. Cox reserved judgment on the degree of formality in setting out the group's procedures.

Asked why Presidents have shown a marked reluctance to consult since passage of the War Powers Resolution, Mr. Reveley advanced three reasons: (1) avoidance of the suggestion that prior Congressional approval is necessary; (2) need for speed; (3) fear of leaks.

Mr. Cox added that regardless of how a particular President may feel about consulting with Congress, he is reluctant to act at odds with his predecessors.

In response to the question of pursuing the War Powers Resolution route as against other legislative avenues, the witnesses volunteered various reasons. In essence, they viewed the Resolution as the best mechanism for implementing the constitutional division of the war powers and the more efficient way of arriving at a true national consensus. Moreover, adherence to the law would clarify and implement the original

constitutional understanding, an issue which the courts would unlikely resolve. Individually tailored legislative responses to international trouble spots could have unfortunate and unperceived consequences as illustrated by the Tonkin Gulf Resolution. Likewise, appropriations for the military could have unforeseen and undesirable implications in litigation. Finally, the 60 day automatic termination provision of the law was a reasonable requirement, since the refusal of Congress to authorize further hostilities more than likely reflected the absence of national unity in connection with those hostilities.

Mr. Reveley relying on the civil rights experience in the south, added that laws can and do influence behavior.

With a ringing endorsement by the witnesses that the Framers clearly intended Congress to be consulted on warmaking decisions except in the case of a sudden attack on the United States, the hearing was adjourned at 11:45.

WAR POWERS, LIBYA, AND STATE-SPONSORED TERRORISM

THURSDAY, MAY 15, 1986

House of Representatives,
Committee on Foreign Affairs,
Subcommittee on Arms Control,
International Security and Science,
Washington, DC.

The subcommittee met at 10:25 a.m., in room 2172, Rayburn House Office Building, Hon. Dante B. Fascell (chairman) presiding.

Mr. Fascell. The subcommittee will come to order.

We meet this morning to continue our hearings on war powers, Libya, and state-sponsored terrorism.

We have already held two hearings, on April 29 and May 1, in which eminent legal scholarsand those with past experience in both the executive and legislative branches testified.

We explored in detail how to integrate executive branch compliance under the terms of the War Powers Resolution with an effective strategy for dealing with state-sponsored terrorism.

We also looked into ways to improve procedures for consultation under the resolution in the case of responses to terrorism.

We will examine today legislative options to deal with these issues. Two pieces of legislation will be reviewed:

H.R. 4611, introduced by Representatives Barton, Hunter, and Livingston, which waives the requirements of the War Powers Resolution and provides the President with blanket authority to take whatever action he deems necessary in responding to terrorism.

Senate Joint Resolution 340, introduced by Senator Byrd with five cosponsors, would establish a permanent consultative body for the purpose of consultation required under section 3 of the War Powers Resolution.

We have several of our colleagues with us this morning who are going to present their views on these proposals, and we are delighted to have them do so.

I want to apologize for being late. I appreciate your courtesy in waiting so that we can get your testimony on the record.

Mr. Fascell. We will hear first from the Honorable Matthew F. R. McHugh, a Representative in Congress from the State of New York and the chairman of the Arms Control and Foreign Policy Caucus, who has been a great spokesman and leader on the question of congressional prerogatives. We are delighted to have you with us, Matt, and look forward to your testimony.

STATEMENT OF HON. MATTHEW F. McHUGH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. McHUGH. Thank you very much, Mr. Chairman.

I appreciate the opportunity to be here. I want to commend you first of all for holding this series of hearings.

I know the catalyst for these hearings has been the recent military action against Libya, but I think the issue transcends in many ways any particular incident and focuses once again on a rather fundamental question: specifically, what are the respective roles of the executive and legislative branches in committing American military forces and, therefore, the American people, to war?

I have a prepared statement, Mr. Chairman, which I would like to submit for the record.

I won't burden you with reading all of it, but I would like to highlight it.

Mr. FASCELL. Without objection, it will be included in the record in full.

You may proceed.

Mr. McHUGH. I would like to highlight the major points in the statement and, if I may, I would like to indicate first that I serve as chairman of the arms control and foreign policy caucus and although my views today are essentially personal, I think it is worth noting that the arms control caucus, which, as you know, is bipartisan and includes both Members of the House and Senate, is a caucus which over many years has defended the rights and responsibilities of Congress with respect to the war power.

So, it is in that tradition that I am here this morning, as well as being here personally.

The framers of the Constitution, as you know, divided the war power between the legislative and Executive branches but unambiguously gave to Congress the major responsibility for decisions to enter into war.

This was an innovation among nations at the time and designed as a restraint upon the Executive. The precise balance between the branches, however, has shifted and continues to shift based on experience, precedent, and circumstance.

There have been historical ebbs and flows in the division of the war power as strong Presidents vie with resurgent Congresses.

The principal method of redrawing the lines has been assertiveness by one branch and and acquiescence by the other from time to time.

The courts have traditionally avoided involvement in these questions which they judge political in nature.

I believe the courts are justified in this determination as long as Congress and the executive branch do not reach a constitutional impasse.

Avoiding such an impasse requires good faith and practical accommodation by both branches.

I think this is an important point, Mr. Chairman, to emphasize good faith and practical accommodation.

In enacting the War Powers Resolution in 1973 over President Nixon's veto, Congress took a deliberate step to clarify its direct role in decisions to send Americans to war while leaving the Presi-

dent, as Commander in Chief, an appropriate amount of flexibility to repel sudden attacks and to conduct a war once the policy decision has been made to enter one.

Its three essential features: prior consultation, reporting requirements, and congressional authorization provide Congress with the mechanism to participate in any decision to commit American forces to combat.

However, having a mechanism for participation is not really enough.

Congress must insist on executive branch compliance with the statutory provisions of the resolution.

Beyond the compliance issue, the subcommittee, as you said, Mr. Chairman, has before it a variety of legislative proposals which would alter the War Powers Resolution, in some cases fundamentally.

I would like to address myself specifically now, if I may, to the two proposals which you have described, one which is sometimes known as the Denton-Dole proposal, but as you said, Mr. Barton, our colleague and others in the House have introduced here, and second, the Byrd proposal.[1]

First of all with respect to the Denton-Dole-Barton proposal, I am strongly opposed to it, Mr. Chairman, and I urge the subcommittee to reject it.

In doing so, I am not suggesting that terrorism is not a threat to the U.S. interests and citizens. It certainly is.

Nor am I suggesting that under no circumstances should military forces be used to combat terrorism.

It may be necessary and appropriate in certain situations, and I supported the President's determination in the recent case of Libya.

What I am saying, however, is that Congress should not surrender to the President in advance the exclusive right to decide when American forces should be committed to combat, as well as how long to keep them there, because the President alone determines that there has been a terrorist act committed, or there is a threat of one being committed against an American.

In effect, this would give the President a blank check to commit this Nation to war and would be an abrogation of congressional responsibility.

The proponents of the legislation argue that it does not confer broad new powers upon the President, because it is limited to combating terrorism.

But what constitutes terrorism?

We have heard many times the administration charge the Government of Nicaragua with supporting terrorism.

Would this be sufficient grounds for the President to commit unilaterally American troops to the overthrow of that Government?

Under this bill, it would.

Indeed, if the President alone concluded that a non-American posed a threat to a facility owned by an American corporation, and that threat was supported in some undefined way by another gov-

---

[1] The text of H.R. 4611, introduced by Representative Barton, appears in app. 6. The text of S.J. Res. 340, introduced by Senator Byrd, appears in app. 5.

ernment to advance a political goal vis-a-vis our Government or simply to intimidate the management of that company the President could unilaterally commit our forces to war for however long he so chose.

I would certainly hope a President would not act in this way, but he could under the terms of this bill.

As you know, Mr. Chairman, the War Powers Resolution requires the President to consult with Congress in every possible instance, before committing American forces to combat.

In doing so, it recognizes that in some circumstances the President may not be able to consult.

Time may not permit consultation, as in the case of the apprehension of the *Achille Lauro* hijackers, or our forces may have to respond immediately to a military threat.

However, the Denton-Dole bill totally relieves the President of any obligation to consult with Congress, even if he has ample time to do so, whenever he alone decides the situation smacks of terrorism as broadly defined in this bill.

Why should we grant the President such unilateral authority?

Some proponents of the legislation maintain that it is necessary to protect sensitive information. That is, congressional leaders with whom the President would consult cannot be trusted.

I reject this suggestion that a select group of congressional leaders is less trustworthy or less willing to respect the need for discretion than those officers of the executive branch who would have the same information.

We all recognize the risk posed by leaks, but this problem is no more endemic to the Congress than in the executive branch, and it is an insufficient basis upon which to deny Congress its constitutional rights and responsibilities with regard to the warmaking power.

Finally, Mr. Chairman, with respect to this particular proposal, I think it is important to stress that it would authorize a President to maintain American forces in combat for an indefinite period of time.

Under the War Powers Resolution, the President's authority is limited to a maximum of 90 days absent congressional consent.

If the President cannot justify the commitment to combat within 90 days, it is a commitment which cannot and should not be sustained.

This aspect of the Denton-Dole proposal reveals the true nature of the bill: an attempt to confer on the President sole authority to initiate war and to keep us at war for as long as he alone deems appropriate.

It is offered in the name of counterterrorism, an understandably popular cause.

However, I trust the subcommittee will see the bill for what it is, an effort to fundamentally shift the warmaking power to the President.

Mr. Chairman, in my statement I have some testimony focusing on the issue of whether the Congress has sufficient control under the appropriations power to restrict American military action where Congress deems appropriate.

Clearly, this is a tool available to Congress, but the point I make in the testimony is that it is an imperfect tool and is not a substitute for the kind of rights we enjoy under the Constitution and under the War Powers Resolution.

The last point I would like to make deals with the Byrd proposal which, as you know, formally would define the list of Members of Congress whom the President should consult in appropriate cases.

It seeks to clarify the consultive provisions of the original War Powers Resolution.

I believe it focuses on a legitimate question. However, I have certain reservations about the Byrd proposal as presently drafted which I would like to summarize very briefly at this time.

First of all, such a consultative group might better be established through changes in House and Senate rules, not by statute.

There is precedent for this. When Congress faced a problem with monitoring intelligence activity in the mid-1970's, both Houses established intelligence committees, not through statute, but through changes in the rules.

Furthermore, if written into statute, the President would have veto power over the composition of the consultative group and over any changes Congress might subsequently wish to make.

The composition of the group should primarily be a matter for congressional determination.

Second, Mr. Chairman, the composition of the grouping should remain somewhat flexible. I have reservations about a group that would be rigidly limited in size or membership.

If a decision involving the Middle East arose, for example, I believe the views of the House Foreign Affairs Europe and Middle East Subcommittee chairman—Mr. Hamilton, in this case—would be valuable, if not indispensable.

Therefore, the group should have the flexibility to include additional Members of Congress, perhaps at the discretion of the Senate and House leadership.

Third, such a group could address matters of peace as well as war.

While the hearings today focus on the War Powers Resolution, the President might find it useful to consult with a knowledgeable group of Congress on peacekeeping as well as warmaking.

Today, such consultations would no doubt focus on possible initiatives in Central America, the Middle East, and southern Africa.

Of course, this is not a question of congressional prerogative, but might prove beneficial nonetheless.

In conclusion, Mr. Chairman, my recommendation is that the War Powers Resolution not be amended in any respect.

I believe that it recognizes a President's legitimate authority to act unilaterally if emergency conditions require it and at the same time it seeks to assure that whenever possible Congress will be consulted before our Nation is committed to hostilities.

It also provides a reasonable mechanism so that no President cannot again conduct war indefinitely without the express authorization of the Congress of the United States.

Although there may be utility in clarifying those Members of Congress with whom a President must consult, I believe it would be

best to do so in a less formal manner than by statutory amendment.

Again, Mr. Chairman and members of the committee, I appreciate the opportunity to be here and I would be happy to answer any questions.

Mr. FASCELL. Thank you very much, Mr. McHugh, for your thoughtful and clear statement and for your suggestions, particularly with respect to the Byrd proposal.

[Mr. McHugh's prepared statement follows:]

Prepared Statement of Hon. Matthew F. McHugh, a Representative in Congress From the State of New York

Mr. Chairman, Members of the Subcommittee, I appreciate the opportunity to testify on one of the most important constitutional and political issues that Congress must deal with -- the process by which our Government may commit our nation to war against other nations.

Although this testimony reflects only my individual views, as chairman of the Arms Control and Foreign Policy Caucus, I wish to note that for many years our bipartisan Caucus has invested much time and energy in the defense of Congress' constitutional rights and responsibilities regarding the war power.

Mr. Chairman, I commend you for calling this series of hearings. While the President's recent military actions against Libya may have been the catalyst for our discussions today, the current debate transcends any particular incident and raises once again a fundamental question: What are the respective roles of the Executive and Legislative Branches in committing American military forces, and thus our people, to war?

You have heard testimony from the Department of State Legal Adviser that the War Powers Resolution should be limited in its application when sensitive information needs protecting, and should be inapplicable when some

military actions are planned against terrorists. Legislation has been introduced which would specifically exempt anti-terrorist actions from the War Powers Resolution. It has even been suggested by some that the role of Congress in decisions leading up to armed conflict has gone the way of Letters of Marque and Reprisal. Let us hope not.

One strength of our constitutional form of Government lies in a jealously guarded system of dispersed powers and checks and balances. The Framers of the Constitution divided the war power between the Legislative and Executive Branches, but unambiguously gave to Congress the major responsibility for decisions to enter into war. This was an innovation among nations at the time and designed as a restraint upon the Executive. The precise balance between Branches, however, has shifted and continues to shift based on experience, precedent, and circumstance.

There have been historical ebbs and flows in the division of the war power as "strong Presidents" vie with "resurgent Congresses." The principal method of redrawing the lines has been assertiveness by one Branch and acquiescence by the other. The courts have traditionally avoided involvement in these questions, which they judge political in nature. I believe the courts are justified in this determination -- as long as Congress and the Executive Branch do not reach a constitutional impasse. Avoiding such an impasse requires good faith and practical accommodation by both Branches.

THE WAR POWERS RESOLUTION

In enacting the War Powers Resolution in 1973 -- over President Nixon's veto -- Congress took a deliberate step to clarify its direct role in

decisions to send Americans to war, while leaving the President as Commander-in-Chief an appropriate amount of flexibility to repel sudden attacks. Its three essential features -- prior consultation, reporting requirements, and congressional authorization -- provide Congress with the mechanism to participate in any decision to commit American forces to combat.

However, having a mechanism for participation is not enough. Congress must insist on Executive Branch compliance with the statutory provisions of the Resolution. This Subcommittee has heard ample testimony on the record of compliance of the present Administration and the two preceding ones. I do not wish to repeat here what has already been said. It is clear we have a problem, a problem which grows more serious with each instance of dubious compliance or outright non-compliance. Taken together, these incidents represent an expanding body of precedents which could form the basis for future non-compliance as well.

Beyond the compliance issue, the Subcommittee has before it a variety of legislative proposals which would alter the War Powers Resolution fundamentally. There are bills which would strengthen its provisions and others which would substantially alter its applicability or effect its repeal. I would like to specifically address two proposals which have been the focus of attention most recently: the so-called Denton-Dole proposal to exempt military strikes against terrorists from the Resolution, and the so-called Byrd proposal to formalize the process of consultations with Congress required under the Resolution.

THE DENTON-DOLE PROPOSAL

I am strongly opposed to S. 2335, the Denton-Dole bill, and urge this Subcommittee to reject it. In doing so, I am not suggesting that terrorism is not a threat to U.S. interests and U.S. citizens. It most certainly is. Nor am I suggesting that under no circumstances should military force be used to combat terrorism. It may be necessary and appropriate in certain situations. What I am saying is that Congress should not surrender to the President in advance the exclusive right to decide when American forces should be committed to combat, as well as how long to keep them there, because the President alone determines that there has been a terrorist act committed, or there is a threat of one being committed against an American. In effect, this would give the President a blank check to commit this nation to war and would be an abrogation of congressional responsibility.

The proponents of this legislation argue that it does not confer broad new powers upon the President, because it is limited to combatting terrorism. But what constitutes terrorism? We have many times heard the Administration charge the Government of Nicaragua with "supporting terrorism." Would this be sufficient grounds for the President to commit unilaterally American troops to the overthrow of that Government? Under this bill, it would.

Indeed, if the President alone concluded that a non-American posed a threat to a facility owned by an American corporation, and that threat was "supported" in some undefined way by another government to advance a political goal vis-a-vis our Government or simply to intimidate the management of that company, the President could unilaterally commit our forces to war for however long he chose to do so. I would hope that a

President would not act in this way, but he could under the terms of this bill.

As you know, the War Powers Resolution requires the President to consult with Congress "in every possible instance" before committing American forces to combat. In doing so, it recognizes that in some circumstances the President may not be able to consult. Time may not permit consultation, as in the case of the apprehension of the Achille Lauro hijackers, or our forces may have to respond immediately to a military threat. However, the Denton-Dole bill totally relieves the President of any obligation to consult with Congress, even if he has ample time to do so, whenever he alone decides the situation smacks of terrorism as broadly defined in the bill.

Why should we grant the President such unilateral authority? Some proponents of the legislation maintain that it is necessary to protect sensitive information, that is, congressional leaders with whom the President would consult cannot be trusted. I reject the suggestion that a select group of congressional leaders is less trustworthy or less willing to respect the need for discretion than those officers of the Executive Branch who would have the same information. We all recognize the risk posed by leaks, but this problem is no more endemic to the Congress than to the Executive Branch. And it is an insufficient basis upon which to deny the Congress its constitutional rights and responsibilities with regard to the war-making power.

Finally, it is particularly important to stress that the Denton-Dole bill would authorize a President to maintain American forces in combat for an indefinite period of time. Under the War Powers Resolution, the

President's authority is limited to a maximum of 90 days absent congressional consent. If the President cannot justify the commitment to combat within 90 days, it is a commitment which cannot and should not be sustained.

This aspect of the Denton-Dole proposal reveals the true nature of the bill -- an attempt to confer on the President sole authority to initiate war, and to keep us at war for so long as he alone deems appropriate. It is offered in the name of counter-terrorism, an understandably popular cause. However, I trust that the Subcommittee will see the bill for what it is, an effort to fundamentally shift the war-making power to the President.

THE APPROPRIATIONS POWER

The Subcommittee has heard testimony emphasizing the potential use by Congress of the appropriations power to influence foreign policy, and specifically to restrict a President's capacity to conduct war. It is an important tool, but its ability to affect specific foreign policy decisions should not be exaggerated.

I am reminded of Teddy Roosevelt's decision to send the American fleet around the world, despite congressional objections to funding the undertaking. Roosevelt replied that since he had enough money to take the fleet halfway, Congress would certainly appropriate the money to get it back.

One need not go back to the turn of the century to see the practical limits on congressional exercise of the appropriations power. Despite the unpopularity of the Indochina war, it was not until 1973 that legislative measures cut funds for the war -- and this was at a time when American

participation was already winding down. The fact is that once the President has committed troops, Congress and the nation are most reluctant to withdraw support. Even if the action is unpopular, Congress does not readily deny American forces the money they need.

More frequently, we see Administration officials point to appropriations as implicit ratification by Congress of Executive Branch actions. This argument was used during the Vietnam War. On April 30, I believe that the Subcommittee heard testimony from the Department of State Legal Adviser suggesting that Congress had endorsed the use of force against terrorism through the appropriation of funds for counterterrorist units in the U.S. military. This is a ludicrous argument. Many of us have voted to maintain our strategic nuclear forces, yet we would not want the Administration to conclude that we have thereby endorsed in advance any subsequent use of our nuclear forces.

THE BYRD PROPOSAL

Senator Byrd has introduced legislation (S.J. Res. 340) which would amend the War Powers Resolution by establishing an 18-member "permanent consultative body" composed of House and Senate leaders for the purpose of prior consultations called for under the Act. As proposed, this group would consist of the Speaker of the House, the President pro tempore of the Senate, the majority and minority leaders of both Houses, and the chairmen and ranking minority members of the armed services, intelligence and foreign affairs committees of both Houses.

Senator Byrd's proposal seeks to clarify the consultative provision (Sec. 3) of the original War Powers Resolution. Since three successive

Administrations have contended at one time or another that this language is so ambiguous as to create questions over whom in Congress to consult, or even to justify decisions not to consult at all, I believe that the Byrd proposal focuses on a legitimate issue. Its clear intent is to strengthen the implementation of the Act by clarifying further Congress' constitutional responsibilities and duties regarding the war power. However, I have certain reservations about the Byrd proposal as presently drafted, which I would like to share with the Subcommittee:

1. Such a consultative group might better be established through changes in House and Senate rules, not by statute. There is precedent for this: when Congress faced a problem with monitoring intelligence activities in the mid-1970's, both Houses established intelligence committees, not through statute, but through changes in the rules. Furthermore, if written into statute, the President would have veto power over the composition of the consultative group, and over any changes Congress might subsequently wish to make. The composition of the group should be a matter primarily for Congressional determination.

2. The composition of the group should remain somewhat flexible. I have reservations about a group that would be rigidly limited in size or membership. If a decision involving the Middle East arose, for example, I believe the views of the House Foreign Affairs Europe & Middle East Subcommittee Chairman would be valuable, if not indispensable. Therefore, the group should have the flexibility to include additional Members of Congress, perhaps at the discretion of the Senate and House leadership.

3. Such a group could address matters of peace as well as war. While the hearings today focus on the War Powers Resolution, the President might

find it useful to consult with a knowledgeable group from Congress on peace-keeping as well as war-making. Today, such consultations would no doubt focus on possible initiatives in Central America, the Middle East, and southern Africa. Of course, this is not a question of Congressional prerogative, but might prove beneficial nonetheless.

In conclusion, Mr. Chairman, my recommendation is that the War Powers Resolution not be amended in any respect. I believe that it recognizes a President's authority to act unilaterally if emergency conditions require it, and at the same time seeks to assure that whenever possible Congress will be consulted before our nation is committed to hostilities. It also provides a reasonable mechanism so that no President can again conduct war indefinitely without the express authorization of the Congress of the United States. Although there may well be utility in clarifying those Members of Congress with whom a President must consult, I believe it would be best to do so in a less formal manner than by statutory amendment.

Thank you.

PROPOSAL FOR A CONSULTATIVE GROUP

Mr. FASCELL. I am struck by the force of your argument, both with regard to the composition of a consultative group and your reasons against establishing it by statute.

I think that it is something we will have to consider very carefully.

I personally support the idea of a consultative group and I think we ought to define it as best we can, certainly better than we have up until now, so that there is not unwarranted criticism of the President when he decides to consult because he didn't consult with the right people or enough people or in a timely fashion.

So, we will have to give that question serious consideration, and I want to thank you for your leadership in this regard. We appreciate your taking time to come here today and give us your views.

Mr. Broomfield.

Mr. BROOMFIELD. Thank you, Mr. Chairman.

I also want to congratulate our colleague from New York for an excellent statement.

As I understand, you don't want to do anything as far as changing the war powers legislation, per se; you are interested, obviously, in setting up some kind of new mechanism, not necessarily in legislation, but some kind of agreement with the administration when we have incidents occur such as Libya.

Is that correct?

Mr. MCHUGH. That is correct, Mr. Broomfield.

I think it is important for the President and the Congress to know whom consultations should be conducted with so, as the chairman said, there isn't any argument about it later.

But I think it should be done more informally than by statutory amendment.

COMPOSITION OF PROPOSED CONSULTATIVE GROUP

Mr. BROOMFIELD. Have you given any thought to the composition of such a group?

Mr. MCHUGH. Well, I have no particular quarrel with the list of people suggested by Senator Byrd, but I do think we should afford flexibility there so that, as I said in my testimony, if an issue arises which involves an area where another Member of Congress might have some special knowledge—let's say in the case of the Middle East, Mr. Hamilton and his ranking member on the subcommittee—it would be helpful, I think, to the President to have the benefit of that consultation.

So, we shouldn't freeze into concrete the list of Members who should consult there by perhaps excluding others that would be helpful to include, and so that is another reason not to write it in a statute, but rather to have some more informal understanding between the Congress and the President as to whom should be included and to leave some flexibility for change if that is appropriate.

TIMELY CONSULTATION

Mr. BROOMFIELD. Have you given any thought to the time element?

Mr. McHugh. I think it is almost impossible to define that, Mr. Broomfield.

I think the judgment of the President in any particular case is going to be required and the real issue here is that he understands by law that responsibility means wherever possible as outlined in the War Powers Resolution.

To try to write that into law would be, I think, almost impossible.

CONSULTATION VERSUS NOTIFICATION

Mr. Broomfield. Are you satisfied with the action that the President and the administration took in regard to Libya?

Mr. McHugh. I was not satisfied with the consultation process in the second instance; that is, when the President decided to launch an attack against Libya on April 14.

As I indicated, I supported the President's judgment in that case; I think we had justification in retaliating.

I don't speak for the caucus on that point, but only for myself.

I think, however, the President should have consulted this select, knowledgeable group of Members earlier than he did.

As I understand it, the President called to the White House a group of Members, including members of this committee, after he had launched the planes from Great Britain.

In my judgment, that is notification, not consultation. I don't know that the result would have been any different at all, but I think in many cases, if not all cases, the President would benefit from the views and objections and judgments of knowledgeable Members.

He is not bound by that. He can disregard it if he chooses to.

The only argument I can think of against full conssultation is that somehow this select group or a member of it would divulge sensitive information and thereby compromise the military effort.

That is a serious issue; leakshave been a major problem in this city.

CONSULTATION AND MAINTAINING SECRECY

Mr. Broomfield. I would like to point out that the chairman, as well as myself, are a part of that very, very small group of people that were called to the White House.

We thought it was consultation because there was adequate time if the administration wanted to call off the flight. Obviously, there were several hours before U.S. forces were to arrive at their destination.

But there was no opposition to it during that discussion. I think what disturbs me—and I have to say I come down on the side that you are advocating and recommending here along with the chairman—that in this last Libyan situation it was very, very difficult to physically enter the White House.

We were trying to find an entrance where there wasn't press, because they had some indication that something was up.

They were calling our offices. They wanted to know what was going on. They called over as to why the leadership was summoned to the White House.

Following that meeting, one or two members of the group were asked by the press what was being discussed, and they responded, "Oh, we couldn't say a thing about it." It was very top secret. "But you might want to watch television at 9 o'clock," because President Reagan was going to address the Nation.

It doesn't take a real expert in journalism to put pieces together and recognize something very serious was up if the President was going to address the Nation.

The point I am making is that it is a difficult matter to work out.

I still favor consultation with a very, very small group in advance of a strike of the kind we had with Libya.

I certainly don't believe that the War Powers Act should be amended to cover that situation.

Mr. McHugh. Thank you, Mr. Broomfield. I agree.

Mr. Fascell. Mr. Hyde.

COMPOSITION OF PROPOSED CONSULTATIVE GROUP

Mr. Hyde. Thank you, Mr. Chairman.

I have no problem even putting it in statute form about this group that the President—that we designate as the group to be consulted and I certainly think consultation is important wherever feasible.

It is kind of a judgment call depending on the circumstances. I would like to have the consultative group be no more than the three Democratic leaders in both bodies, and the three Republican leaders, the top three. So we are talking about 12 people, really, 6 from each body and that may be—that is probably manageable.

The chairman of the Foreign Affairs Committee would like to be there. The chairman of the Armed Services Committee would like to be there. The chairman of the Appropriations Committee would like to be there, et cetera.

And they, by invitation, I suppose, could come, but statutorily, I think these men or women have been selected by the Chambers as their leaders, by the parties as their leaders, and that might simplify things.

I think that is what is done now.

TIMELINESS OF CONSULTATION

The problem of timeliness is another matter. Now, Mr. Broomfield adverted to the fact that the briefing on the last Libyan strike may have been compromised by television and the chairman and I had a little discussion about that, and I did some checking and I would like the record to show what I found out was that the Presidential briefing of congressional leaders was from 4 to 5:45 p.m.

By 5:59, Sam Donaldson was demanding that Larry Speakes confirm or deny they were going to hit Libya. ABC had its first report on suggesting this by 6:30 p.m.

Now, I am informed by the National Security Council that the first notification of the Libya bombing raid occurred at 7:11 p.m., 11 minutes after the raid started and that went to Jack Smith of CBS who was the media-pool contact at that time.

Shortly thereafter, Larry Speakes held a press conference.

So, what was said as the White House group that was consulted with left, did tip off the press, or they have remarkable insight and drew some interesting conclusions which happened to be right.

So, I merely give that litany to indicate that the White House was circumspect and did not reveal this, took reasonable precautions not to.

They didn't block out time on television in advance so everybody knew. The first notice to the press was 7:11 p.m., 11 minutes after the raid started.

So, that is the information I have received.

But, I do agree. I think Congress has a very important role to play, and it has to be more than notification unless circumstances are so unusual.

But would you have any objection to incorporating the leaders by title into that and leaving it at that, or do you want a much broader group to be consulted with?

BENEFITS OF PROPER CONSULTATION

Mr. McHugh. I am not sure how much broader the group needs to be, but I think the purpose of consultation is not simply to get the blessing of the political leaders in Congress, although that is important, but in addition to that, for the President to have the benefit of the objections and knowledge of informed Members of Congress in the area which is relevant to the discussion.

Mr. Hyde. Would you define "consultation" in the statute then, as something more than—well, I don't know what consultation means.

I have an idea, but when you are drafting statutory language it is somewhere between notification and advice and consent, I suppose.

Mr. McHugh. That is right. I think that is a good area to look at.

To me, it means that the President would seek to share with a limited group of Members his plans and solicit their views so that he would have the benefit of that and could, if he so chose, modify those plans accordingly, not being bound to do so, of course.

I think consultation is designed, not simply as a way of fulfilling congressional prerogatives, but as a method of helping the President with the advice of people who are knowledgeable.

The leadership you have described might very well be knowledgeable and fulfill this purpose but it is possible, and I think likely in many cases, that some additional limited number of Members would be particularly knowledgeable about this issue.

SUPPORT FOR INFORMAL PROCESS OVER STATUTORY AMENDMENT

Mr. Hyde. I agree.

Would you mandate that in the statute or would you say the President "should?"

Mr. McHugh. I would like to see more flexibility than less.

Mr. Hyde. Right.

Mr. McHugh. That is why I suggest a more informal arrangement rather than a statutory amendment.

Mr. Hyde. Thank you very much.

I yield back.

CONSULTATION AS ENVISIONED IN WAR POWERS RESOLUTION

Mr. FASCELL. Let me say, Matt, that the discussion in the committee report on the War Powers Resolution goes into this very question. Since we couldn't provide an exact definition in the statute, we chose the method of outlining our views on what we would consider proper and timely consultation in the committee report.

TIMING OF WHITE HOUSE BRIEFING

I want to get to something else, but in the same general area.

First of all, let me set the record straight with respect to the White House meeting. I was downtown at a press conference, and the question of Libya was the all-consuming issue of that conference, with me on the firing line.

Now, you didn't have to be a genius to anticipate at that point, with all that was going on, and I had no prior knowledge, that something was about to happen.

And I told the press: "I will try to talk to you tomorrow morning."

Subsequently, I was asked to attend the White House meeting, and, again, you didn't have to be a genius to figure out what that meeting was about.

I got there at 4. When we were brought into the room we were notified that a decision had been taken and that the operation was in effect, period.

Now, we got halfway through the discussion and the chairman, the person who was chairing the meeting at that time, said: "Well, the airplanes are in the area, but, if Congress, if you gentlemen, want us to call them back, we will certainly listen."

Now, why did the chairman say that? Because there was some objection, not with respect to the mission itself, but only because there had been no prior consultation under the War Powers Resolution.

Several members raised that issue. So, the chairman then presiding said: "Well, we are cognizant of that and that is the reason you are here."

I didn't pull out my stopwatch to find out whether or not the aircraft were past the point of no return, but theoretically, if everybody had reacted negatively, I suppose it would have created some grave concern on the part of the President.

But the President, because he has great political acumen, recognized that there would be no strong opposition. He would have taken it into consideration, I am sure, if there had been any, but that wasn't the case.

COMPLAINT ABOUT CONSULTATION AT WHITE HOUSE BRIEFING

There was a complaint about compliance with War Powers Resolution with respect to prior, timely and adequate consultation.

Now, that complaint was countered by the statement: "Well, is anybody against it? You know, we have the opportunity to call the planes back."

Nobody responded, there was no objection. So, therefore, not only did the mission continue, but, quote, "satisfied the requirements of the War Powers Resolution."

Well, I don't quite see it that way.

But that is, to the best of my judgment, basically what happened.

Now, before the President left, I said: "Mr. President, there is a different question involved here, also, and it is a constitutional one. It has got nothing to do with the War Powers Resolution. I want you to know that I am raising the question now because I intend to raise it later, and it is a very serious question. I support the mission. But I still have grave reservations about a process which does not satisfy constitutional requirements with regard to the involvement of the Congress under the war powers clause of the Constitution."

NATURE OF CONSULTATION ENVISIONED IN WAR POWERS RESOLUTION

Now, let me shift back to the question I want to ask you.

Regarding consultation, we were very careful when we wrote the War Powers Resolution to leave it to the judgment of the President as to what constituted a good-faith effort to consult.

Now, I would like your own opinion, but to my mind there is a difference between being briefed on the details of a battle plan and a discussion and consultation on a broad policy problem and the possible solutions to that problem. I have never been involved in that kind of a discussion—certainly not on the question of Libya with the executive branch. I think it would be useful, as you point out, to have those kinds of discussions.

I am asking you, therefore, in the view of the position you have taken on consultation, whether you agree that it is not the details of the battle plan but the broad policy questions you are interested in as a Member of Congress?

CONSULTATION SHOULD ADDRESS THE COMMITMENT OF TROOPS

Mr. McHugh. I agree with you completely, Mr. Chairman. I think it is the job of the Commander in Chief of the Armed Forces, the President, to conduct a military operation, and the details of that operation should be left to the experts—the military people and the Commander in Chief.

However, under the Constitution, it is the responsibility of the Congress to at least participate in the fundamental policy decision to enter into war and no more important decision can be made by a government, democracy or otherwise, than committing a nation to war.

That is the issue here.

So, consultation should be around the question of whether the United States of America should commit its troops to hostilities or to conditions which suggest imminent hostilities, in the words of the War Powers Resolution, and not to the questions of how these hostilities will be conducted in specific detail.

So, I agree with you completely, and I would hope that consultation would be meaningful in that context.

As I said, and as you have just said, I think a President would benefit by having reasonably regular, at his discretion, consulta-

tions even when it is not required by the Constitution or by the War Powers Resolution with respect to these kind of issues, because I think the President could benefit from time to time by the advice and suggestions of people who, in some cases like yourself and Mr. Broomfield, have spent years considering these matters in various parts of the world.

There is no requirement in the Constitution for that.

But I think that type of consultation would be helpful to a President, and I would think that on those kinds of policy issues—not details of operations—we should encourage the President to proceed.

I would not write that into statute, by any means.

CONSULTATION ON BROAD POLICY QUESTIONS

Mr. FASCELL. Do you feel, therefore, that most Members of Congress would be satisfied, with respect to both War Powers Resolution compliance and Congress war powers under the Constitution, if the consultation sought by the President with an appropriate group in the Congress was on the question of policy and options? In other words, the President might limit consultation to these broad questions that do not in any way impair his position as Commander in Chief of the Armed Forces?

Mr. MCHUGH. I think so.

And, I would go one step further, if I understand what you are saying.

If a President determined that he wanted to commit the U.S. forces to combat, then I think he has an obligation, if possible, if feasible, to consult with the congressional group on that particular determination.

But I certainly think that what you have suggested is not inconsistent with that and would certainly be received fairly by most of our colleagues.

WAR POWERS UNDER THE CONSTITUTION

Mr. FASCELL. Let's shift gears, if I may. Let's look at the constitutional question as separate from the statutory requirements of the War Powers Resolution. Under the Constitution, only Congress can declare war.

We have had discussions on this issue since the founding of the country, as you said in your testimony. The President has had a great deal of flexibility in dealing with this, depending on his assertiveness and the acquiescence of the Congress.

But there have always been exceptions to the absolute constitutional requirement of Congress declaring war. The protection of Americans is one; self-defense is another. And so, through the years we have built up, through precedence and acceptance, a working relationship on the use of force between the Congress and the President.

This is the crux of your testimony, as I understand it. Am I correct?

Mr. MCHUGH. Yes.

STRIKE AGAINST LIBYA AS SELF-DEFENSE OR ACT OF WAR

Mr. FASCELL. Well, I happen to agree with that, because I think that is factually accurate. I think that is what has happened.

We come to today, however, to the last Libyan strike. The rationale was self-defense, as far as the administration was concerned.

It was self-defense in the sense that a country engaging in state-supported terrorism—to wit, Libya—had declared war on innocent men and women around the world, including Americans, and therefore, in defense of Americans and for the purpose of their protection under international law, the United States had the right to act unilaterally. This was the rationale for an exception to the absolute construction of the constitutional requirement that only Congress can declare war.

It left, and it leaves unanswered whether or not a military strike by the United States on a sovereign country is an act of war in itself. And whether it is self-defense or not, it is in my judgment an act of war.

Whether or not the Congress could have been advised or should have been advised or could have been brought in on a strike of this kind is a totally different question.

It may be that we now have another exception to the constitutional requirement that Congress must approve the use of military force.

I think Mr. Hyde feels that way. I don't want to put words in his mouth.

FORMAL DECLARATION OF WAR ANACHRONISTIC

Mr. HYDE. Well, I just think perhaps that is the chairman's definition of declaring war, and what that means is perhaps broader than the Founding Fathers envisioned.

I say that because the Founding Fathers considered "make" war and "declare" war. It is like declaring bankruptcy or being bankrupt. You can be bankrupt but you have not declared it yet, and have not had it legally confirmed.

But to say that every act of belligerency—Vietnam, Korea—was war in the legal sense does trouble me because so many other laws get kicked in, treason, trading with the enemy, censorship. That is why I truly and really believe this declaration of war is anachronistic. We won't see that any more. The momentum that—if we had declared war on Vietnam, and one reason we didn't was clearly that China would have been obligated to declare war on us and Russia to declare war on us. They would have to flock to their allies and not abandon them.

God knows the Canadian wheat ships going in there, we would have had to sink them. So we need to study this more. We need maybe a state of belligerency, a middle ground between war and peace, where certain things kick in in the way of Congress' duties. But it is a very critical and vague part of the constitution and our understanding of it is vague.

SIGNIFICANCE OF PRESIDENT'S APRIL 14 POLICY STATEMENT

Chairman FASCELL. I think that states the dilemma that we face. We will put the President's exact words in the record because his policy statement is a predicate for our discussion.[1]

The President was justifiably aggravated and frustrated and determined to protect American interests and lives when he stated that we are not going to put up with state-supported terrorism. He served notice that we are not going to put up with terrorism and that the United States would strike anywhere, at any time, to counter this threat.

Now that is a policy statement. Congress is now on notice, the American people are on notice and our adversaries are on notice.

CONGRESSIONAL RESPONSE TO PRESIDENT'S POLICY STATEMENT

Now that the President has declared this policy, what should the congressional input be at this point?

We are meeting among ourselves and having this dialog. Should we, for example, have a group, such as that proposed in the Byrd legislation, to discuss policy with the administration? This would be an off-the-record discussion. But we would want to discuss the entire range of policy questions, where are we going, what it is going to cost, who are we talking about, that kind of thing.

Mr. HYDE. You are convinced, are you not, that if the President did anything similar to Libya that he would again consult with those Members that he did?

Chairman FASCELL. I am sure he would, Henry. But if you are going to strike country X in order to solve a problem, I think as a matter of policy we need a little further discussion on the subject. That is all.

NEED TO INVOLVE CONGRESS IN POLICYMAKING

Mr. MCHUGH. Mr. Chairman, I think you are absolutely right. The Constitution and the War Powers Resolution are still the law of the land. It is your view and mine that these are fundamental laws which require meaningful consultation. Reasonable people can differ over what consultation means from time to time, and that should be discussed in the way you have described.

The fundamental premise underlying all of this is that when one decides on a policy of war or acts of war, wherever possible the Congress must be involved.

Chairman FASCELL. Not simply in the appropriations process through the provision of money to conduct an operation.

Mr. MCHUGH. That is right. That is a very imperfect process and in any case independent of the constitutional right that Congress has in these matters.

Chairman FASCELL. Well, I want to thank you for your contribution to the dialog we are having on this very important subject. And I look forward to contining working with you and the Arms Control and Foreign Policy Caucus in further evolvement of this

---

[1] See app. 3.

issue. Clearly, we are a long way from resolving it here and we are going to need the broadest possible discussion in the Congress.

I feel it is our responsibility as Members of Congress, and particularly in the Foreign Affairs Committee, not simply to let the President's policy statement stand without a careful examination by the Congress and a decision by the Congress as to how and when and to what extent Congress should participate.

Mr. McHugh. Thank you, Mr. Chairman.

Chairman Fascell. We will take a brief recess to vote, then come back and hear the other witnesses.

We will stand in recess until after the vote.

[Recess.]

Chairman Fascell. The committee will resume.

We are delighted to have you both here, and we look forward to your testimony. So before the bells ring again, why don't you get started.

STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Barton. Mr. Chairman, first of all——

Chairman Fascell. Would you pull the mike closer to you? It is voice activated.

Mr. Barton. Mr. Chairman, we do appreciate the opportunity to appear before your subcommittee and discuss our bill, the Antiterrorism Act of 1986, in your discussions about how we can best combat terrorism.

Mr. Barton. Congressman Livingston, Congressman Hunter, who is by my side, along with Senators Denton and Dole in the Senate, introduced this bill on April 17. The goal of our bill is to enable the President to take firm and decisive action against terrorism. Our bill relates only to antiterrorism operations.

The Antiterrorism Act of 1986 clarifies the authority of the President to use force to combat terrorism. The bill does this by defining acts of terrorism as acts of aggression against the United States. The President currently has the authority to respond to acts of aggression with military force. Terrorism is defined as violent activity directed at U.S. citizens and organizations that is intended to intimidate civilian populations or influence Government policy.

The bill would establish that terrorism is aggression against the United States and counterterrorism may be pursued with deadly force.

The bill also clarifies the legal authority of the President to use force to combat terrorism until such time as the terrorist threat no longer exists.

Under the War Powers Resolution, the President must have the approval of the Congress in order to commit American military forces overseas for more than 60 days. I would like to read from the House report on the 1973 War Powers Resolution, Mr. Chairman, on exactly what consultation was intended to be, to least by the authors in the House of Representatives, and I quote,

> Consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and their approval.

So at least in the House report there is a very clear definition of consultation and that definition is not strictly to be informed. It is to be asked while the decision is pending and to be asked for approval. It also goes on that one could interpret this approval process to be the entire Congress, not just a small select group of individuals, although it is unclear on that point.

Congress passed the War Powers Resolution in 1973 during the last days of direct United States involvement in the Vietnam war. The Antiterrorism Act would guarantee that the War Powers Resolution does not restrict the ability of the President to combat terrorism by creating an exception to the resolution. Any antiterrorism military operations would no longer be subject to the War Powers Resolution.

The bill also includes a provision to ensure that the authority granted to the President must be exercised in full accordance with the provisions of the Constitution. Our bill does not alter the balance between the Congress and the President.

There is a new threat to the United States that did not exist in 1973 when the War Powers Resolution was passed, and that threat is state-sponsored terrorism. State-sponsored terrorism is a form of low-level but constant warfare against the United States and other Western countries. We must recognize this new form of aggression and develop a new counterterrorism strategy.

President Reagan has initiated a counterterrorism policy based on economic sanctions, diplomatic isolation, and military action. I believe this is a sensible policy designed to counter the rising wave of international terrorism. As the leader of the free world, the United States should adopt this policy.

There is one potential obstacle to the adoption of this American counterterrorism policy, the War Powers Resolution, because that resolution requires the President consult with the Congress before he takes any military action against terrorism. This raises the risk that details of the operations will leak to the press and find their way into the hands of foreign nations.

Consultation also sharply reduces the reaction time of the President, a vital consideration. The War Powers Resolution with respect to counterterrorism is unworkable in an absolute legal sense. We should exempt U.S. antiterrorism operations from this resolution. The President should be given the flexibility to implement his antiterrorism policy and he cannot do it unless we take this action.

I would like to go through and summarize, I know you are pressed for time.

Chairman FASCELL. We will put your full statement in the record.

Mr. BARTON. So I would just summarize some of the points you talked about with Congressman McHugh.

Chairman FASCELL. That would be helpful.

Mr. BARTON. There is a constitutional question concerning the use of military force and the consultative role between the Congress and the President. As Congressman McHugh pointed out, it is obvious that the Congress of the United States has the authority and power to declare war. However, in article II of the Constitution the President is given the authority to be the Commander in Chief

of our Armed Forces and also to be the chief implementer of foreign policy.

Both of these activities are subject to review by the Congress, and must ultimately be supported by the American people.

So you have a situation where the Congress has to declare war but the President is the Commander in Chief and he conducts foreign policy. In my opinion, in order to conduct an effective counterterrorism strategy which I think we all support, the President has got to be given the authority and flexibility to act and to act quickly and by bringing in the War Powers Resolution, such swift action is not possible.

As one of the chief authors of the War Powers Resolution in the House of Representatives, you know that terrorism was not discussed in 1973. I have gone back and read the conference reports and legislative history, and I see nowhere where terrorism was mentioned. So we passed a resolution in 1973 to try to prevent the President from getting us involved in an undeclared long-term war, and we have got a situation today where if we are going to be effective against terrorism, somebody has got to act and act quickly and the President has got to have that authority.

So I think there should be an exemption to the War Powers Resolution not to repeal it or do away with it, but to give the President the authority to act in counterterrorism.

Now, we have used military force in our foreign policy operations for the last 200 years. The first President to conduct a military operation against Libya was Thomas Jefferson when he sent the Navy and Marines over to fight the Barbary pirates. He was one of the Founding Fathers that Congressman Hyde was referring to in some of his questions.

So it is obvious that Thomas Jefferson who was one of the Founding Fathers felt that he had the constitutional prerogative to fight the equivalent of terrorism in his day and he did so very effectively.

There have been 200 instances since our Constitution was adopted when American Presidents have used military force outside of our borders. There have only been five times that there has been a declared war. So this is not something that is just coming to the surface, that we have an imperial Presidency that is now trying to get us into all of these undeclared wars.

In my opinion, prior consultation simply does not work for two reasons. No. 1, as Congressman Hyde referred to, you do have a problem with secrecy. I think you also alluded to that, Mr. Chairman.

I am not saying that Members of Congress cannot be pledged to hold a secret, but the more people that are involved the greater the likelihood somebody will say something and somebody in the press is going to pick up on it and they are going to start asking questions and before long, the word is out and American lives are put in jeopardy and success of the mission is put in jeopardy.

Second, sometimes there is simply not time for consultation. If an airliner is hijacked and it is over the Mediterranean and we have an aircraft carrier with the means to launch aircraft and apprehend the airliner there is simply not time for consultation. In a technical sense the President could make a few phone calls, he

60-907 O - 86 - 7

could ask you, he could have the Speaker, the majority leader of the Senate for approval but in a real sense he should be given the authority explicitly to go ahead and act and then inform later.

So I don't think advance consultation works.

In summary, I sit here as you and Mr. Broomfield and Mr. Hyde asking questions of Congressman McHugh, and I agreed with about 95 percent of what you were saying and what Congressman McHugh was saying and Congressman Hyde and Congressman Broomfield were saying. Where I disagreed is with regard to consultation. No matter how small you make the group, you are going to tie the President's hands if you really require him to get prior approval.

No. 2, there is a serious constitutional question about whether the Congress should be involved prior to making some of these tactical decisions. I totally agree with your comment that the Congress should be involved in the overall policy decisions. The President cannot conduct an effective foreign policy without the support of the Congress and the support of the American people.

So we should be involved in that. That is why we are elected. But on a day-to-day basis, when you are combating a worldwide terror-network that strikes and strikes quickly, I don't think it is realistic to expect that whatever number of Congressmen, whatever their station, whatever their expertise, are going to be any more effective in giving the President the authority and the ability to protect American lives and American citizens.

So I think the legislation that Congressman Hunter, myself, Livingston, Senators Dole and Denton have put into the hopper is a reasonable piece of legislation. It doesn't do away with the War Powers Resolution. It gives an exemption to it. It is an exemption that I think is very important for your committee to consider as you look at the overall situation today.

So I thank you for your time and will answer questions at this time.

[Mr. Barton's prepared statement follows:]

PREPARED STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

THE NEED FOR A CLEAR COUNTERTERRORISM POLICY

Mr. Chairman, Members of the House Foreign Affairs Committee, I want to thank you for allowing me to testify before you today on the Anti-Terrorism Act of 1986, which was introduced by Rep. Bob Livingston, Rep. Duncan Hunter, and myself on April 17, 1986. The goal of our bill is to enable the President to take firm and decisive action against terrorism. Our bill relates only to antiterrorism operations.

The Anti-Terrorism Act of 1986 clarifies the authority of the President to use force to combat terrorism. The bill does this through defining acts of terrorism as acts of aggression against the U.S. The President currently has authority to respond to acts of aggression with military force. Terrorism is defined as violent activity directed at U.S. citizens and organizations that is intended to intimidate civilian populations or influence government policy. The bill would establish that terrorism is aggression against the U.S. and may be pursued with "deadly force."

The bill also clarifies the legal authority of the President to use force to combat terrorism until such time as the terrorist threat no longer exists. Under the War Powers Resolution, the President must have the approval of the Congress in order to commit American military forces overseas for more than 60 days. Congress passed the War Powers Resolution in 1973 during the last days of direct U.S. involvement in the Vietnam War. The Anti-Terrorism Act would guarantee that the War Powers Resolution does not restrict the ability of the President to combat terrorism by creating an exception to the Resolution: any antiterrorism military operations would no longer be subject to the War Powers Resolution. The bill also includes a provision to ensure that the authority granted to the President be exercised in full accordance with the provisions of the Constitution. Our bill does not alter the balance between the Congress and the President.

In November 1973, the U.S. Congress passed the War Powers Resolution over the veto of President Richard Nixon. As stated in the committee reports, the basic intent of the Resolution was to ensure that our country does not become involved in a war that does not have the solid backing of the American people. I agree with the basis intent of the War Powers Resolution. Lack of popular support was an important factor in the U.S. withdrawal from South Vietnam.

However, there is a new threat to the United States that did not exist in 1973: state-sponsored terrorism. State-sponsored terrorism is a form of low level, but constant, warfare against the U.S. and other Western countries. We must recognize this new form of aggression and develop a new counterterrorism strategy. President Reagan has initiated a counterterrorism policy based on economic sanctions, diplomatic isolation, and military action. I believe that this is a sensible policy designed to counter the rising wave of international terrorism. As the leader of the Free World the U.S. should adopt this policy.

As you well know, President Reagan turned to economic sanctions before he considered military operations against Libyan state-sponsored terrorism. Even then, the President did not act until he had clear proof of Libyan involvement in the bombing of a West German nightclub which claimed an American life. But Libya ignored the repeated warnings of the past, and President Reagan was left with no choice but to turn to the military option.

However, there is one potential obstacle to the adoption of this American counterterrorism policy: the War Powers Resolution. The War Powers Resolution requires that the President consult with Congress before he takes any military

action against terrorism. This raises the risk that details of the operation will leak to the press, and find their way into the hands of foreign nations. Consultation also sharply reduces the reaction time of the President, a vital consideration when it comes to counterterrorism operations. Israeli doctrine dictates that military retaliation for a terrorist act must take place within 72 hours of the act. Another significant flaw of the War Powers Resolution is the lack of any provision for emergency military operations to rescue American citizens held hostage by terrorists or allow American armed forces to defend themselves against attack by terrorists or other enemies.

The War Powers Resolution is unworkable, in an absolute legal sense, when it comes to U.S. counterterrorism policy. We should exempt U.S. antiterrorism operations from the Resolution. The President should be given the flexibility to implement his antiterrorism policy, and he cannot do it unless we take this action. Today, all Americans are potential targets for terrorists. Adoption of the Anti-Terrorism Act may minimize the number of American victims.

CONSTITUTIONAL QUESTIONS CONCERNING THE USE OF U.S. MILITARY FORCE

Passage of the War Powers Resolution in 1973 clearly showed that Congress wanted to play a more active role in the conduct of American foreign policy, at least when military operations are considered. This Congressional activism has never been tested for its constitutionality, but raises serious questions.

Article II of the U.S. Constitution grants the President the authority to command our armed forces and conduct foreign policy. Both of these activities are subject to review by the Congress, and must ultimately be supported by the American people.

Counterterrorism in an effective fashion requires that the President be allowed full flexibility to utilize both his powers as Commander-In-Chief and architect of American foreign policy. The War Powers Resolution potentially limits this flexibility. Since the War Powers Resolution was not enacted with terrorism in mind, and since the President clearly has constitutional right to conduct counterterrorism operations to further foreign policy objectives, and protect American armed forces from terrorist attacks, it makes good sense to exempt such activities from the jurisdiction of the War Powers Resolution.

THE USE OF MILITARY FORCE IN U.S. FOREIGN POLICY

Some in Congress and elsewhere are convinced that "presidential wars" are the invention of President Lyndon Johnson and President Richard Nixon. This historical revisionism is a totally false. Another popular falsehood is that President Reagan has been quick to use U.S. military force to achieve foreign policy goals. The record of the past six years demonstrates this to be false.

Contrary to the rhetoric of liberal proponents of War Powers Resolution, "presidential" wars were not the invention of President Johnson and President Nixon. They were the invention of men such as Thomas Jefferson and Woodrow Wilson. In fact, the first time U.S. naval forces engaged in hostilities in Libya was in 1801, on the marching orders of President Thomas Jefferson. It is important to note that there was no declaration of war in this instance.

There are some who argue that the use of American military force without a declaration of war is unconstitutional. If this is true, the men who wrote our Constitution, violated it when they conducted an undeclared naval war with France from 1798-1800, when they sent military expeditions to Libya during the

First Barbary War that lasted from 1801-1805, and when they ordered military expeditions to enter Spanish territory in Florida and Mexico to settle border disputes between the U.S. and the Spanish Empire in 1806, 1810, and 1812.

This great country has been forced to use military force abroad to defend and protect American interests in over 200 instances since we won our freedom. Only 5 of these conflicts were declared wars. A review of the 200 instances where the United States was compelled to use military force for some foreign policy purpose indicates that the application of American military force has slowed remarkably since World War II. If there was a period of U.S. history when the War Powers Resolution was needed, it was from 1850 through 1925, when most of these instances of American military intervention occured. Contrary to popular convention, the incidence of "presidential" wars has declined very sharply since 1945.

Presidents have used American military force without declarations of war in the past for good reason. Generally, action had to be taken immediately, and Congressional authorization could not be expected in a speedy manner. In addition, the military action was not large in scale or long in duration, and there was no expectation that the action would demand a national commitment.

There is a wide divergence of opinions in the Congress over the role of military force in American foreign policy. Some Members of Congress believe that military force has a legitimate role in our foreign policy. I am one of these Members. Others believe that America should never use force. I should point out that such a divergence is not very easily compromised. Those of my House colleagues who introduced legislation to impeach President Reagan for his "unconstitutional" use of military force in the liberation of Grenada are not going to support any use of force against terrorism. They will call for negotiations, and the moment for action will pass.

There are some who believe that foreign policy should be conducted by the Congress and the people. They believe that we should not act until there is a clear public consensus for any particular foreign policy initiative. The U.S. Constitution is clear in this respect: the President is the architect and the executor of American foreign policy. Congress certainly has a role in foreign policy, but it is a supporting role. I believe that our Founding Fathers were wise when they established this balance in our foreign policy. The President is in a position where he can act quickly in the arena of foreign policy. The Congress is not disposed towards speedy and decisive action in this respect.

Those who champion the role of the Congress in foreign policy frequently suggest that Congress should act as a conduit of the public will, and act as a sort of massive polling service. Clearly, a national referendum on the use of U.S. military force is unworkable. One month before the U.S. was dragged into the Second World War, at a time when the need to counter Nazism and Japanese Imperialism had become obvious, the House of Representatives came within one vote of abandoning the draft. This action would have forced the U.S. Army to release hundreds of thousands of servicemen and left the United States totally unprepared for war. If the Congress cannot discern the dire threat that Nazi Germany and Imperial Japan posed to the United States one month before Pearl Harbor, I am not confident that we will be able to make reasonable decisions about the threat posed to our country by international terrorism.

A requirement of advance consultation with the full Congress before the U.S. launches antiterrorism operations will guarantee that Congress will take no effective action against international terrorism. Consultation will ensure that America loses the war against terrorism. For that reason, I propose an exemption from the consultation requirements of the War Powers Resolution for

antiterrorism operations. However, the Anti-Terrorism Act of 1986 requires that the President must justify any antiterrorism operations to the Congress within ten days of the operation. We do not give the President a blank check.

LEGISLATIVE HISTORY OF WAR POWERS LEGISLATION

What were the motives of Congress in 1973, when the War Powers Resolution became law over a Presidential veto? According to Senator Tom Eagleton, one of his colleagues explained his vote for the War Powers Resolution and against the U.S. Constitution, in the following terms: "I love the Constitution, but I hate Nixon more." Apparently in the eyes of some, the War Powers Resolution was a vehicle to embarrass President Nixon and undermine his authority as the President of the United States. As such, the larger question of how the U.S. should best respond to acts of aggression was neglected by some.

It is important to remember the political circumstances that governed the consideration and passage of the War Powers Resolution. The deterioration of the political position of President Nixon in the Congress had eroded support for these emergency exemptions. The suspicion that the President would misuse exemptions in order to prolong U.S. involvement in Indochinca was foremost in the minds of many Congressmen and Senators. As a result, important provisions in war powers legislation essential to national security were omitted.

There were many difficult issues that were debated during consideration of war powers legislation. One of the most important disputes related to the need for a narrow range of emergency exemptions that would allow the President to use American military forces for specific purposes. Those who favored the concept of exemptions argued that the general goal of war powers legislation was to prevent a situation such as Indochina, where hundreds of thousands of American servicemen were deployed, and tens of thousands were either killed or wounded, without a declaration of war. War powers legislation could prevent such a massive commitment of American troops without the approval of Congress. But should war powers legislation also prevent the dispatch of American forces to rescue U.S. citizens threatened by hostilities or prohibit our armed forces from defending themselves in the face of foreign attack? Many Members thought that exemptions were needed in order in enable the President to launch rescue operations and permit our armed forces to defend themselves without opening a loophole that could be used by a President to avoid the War Powers Resolution. The deployment of U.S. armed forces to Indochina could hardly be justified as an operation designed to rescue American citizens.

However, by the fall of 1973 the distrust of President Nixon had grown to such proportions that many opposed any exemptions, no matter how necessary, on the grounds that there was room for abuse by the President. Suspicion led the Congress to remove all emergency exemptions, and all flexibility, from the War Powers Resolution. The Anti-Terrorism Act of 1986 would instill a measure of flexibility in the War Powers Resolution through the creation of an emergency exemption for antiterrorism and counterterrorism operations.

There was also a vigorous debate over whether there should be an absolute time limit on the commitment of American military forces without Congressional approval. Many proponents of war powers legislation opposed any absolute time limit on the grounds that foreign powers would know they could wait us out in the event our forces were deployed to prevent the outbreak of hostilities. A foreign power would know that they only had to hold back during the period of American deployment, whether that period was 30 day, 60 days, 90 days, or 120 days, until U.S. military forces were withdrawn. Then a foreign power could launch an invasion or an attack without fear of effective U.S. intervention.

An absolute time limit would let our adversaries know that a clock was running when American military forces were deployed in a hostile situation.

However, some Members believed that an absolute time limit was essential in order to prevent the open-ended commitment of American military forces to hostilities. The Senate tended to prefer an absolute time limit more than the House, and Senate leaders such as Senator Jacob Javits (R-New York) tended to prefer a 30 day limit over any other time period. The House tended to prefer a 120 day period for an absolute time limit. Obviously, a 120 day time limit gives the President much more flexibility than a 30 or 60 day limitation.

Unfortunately, the resolution that finally passed the Congress and became law incorporated the worst elements of war powers legislation. The War Powers Resolution that became law did not have any provision for emergency exemptions and did include a rigid 60 day timetable for Congressional action. The War Powers Resolution that became law also included a legislative veto, which was thankfully struck down by U.S. Supreme Court in the INS v. Chadha decision.

ADVANCE CONSULTATION DOES NOT WORK

One of the major areas of dispute regarding the War Powers Resolution is the requirement that the President personally consult with Congress "in every possible instance" before the deployment of U.S. military forces. Generally, Presidents have interpreted the advance consultation requirement to mean that Congress should be informed of any military operation before it takes place. The Congress has insisted that consultation means that they should be able to influence decisions. The House report on the War Powers Resolution is clear on this point:

> "Rejected was the notion that this consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice or opinions and, in appropriate circumstances, their approval of the action comtemplated."

However, Presidents have generally walked a line around this requirement for advance consultation. Consultation has been limited to the Congressional leadership instead of the full Congress, and consultation has been limited to informational meetings with little or no opportunity to alter decisions by the President, which may already have been made. Frequently, military operations were already in progress by the time the President informed the Congress.

Clearly, advance consultation has proven to be totally unworkable. The most obvious flaw in advance consultation is the need to maintain secrecy in military operations. The old World War II slogan: "Loose Lips Sink Ships!" is still applicable today. The success of U.S. military operations and the lives of American servicemen should not be jeopardized by leaks. We can expect that advance consultation with Congress before any U.S. military action may result in security leaks and greater risks to our servicemen. Absolute secrecy and surprise are essential to successful military operations, especially when it comes to the kind of special operations that are needed to rescue hostages or supress terrorist organizations.

Actually, some of the most ardent supporters of the War Powers Resolution have endorsed the failure of past Presidents to provide advance consultation. The late Rep. Clement Zablocki (D-Wisconsin), author of the House War Powers Resolution that passed in 1973, supported the lack of advance consultation by President Carter after the failed 1980 Iranian rescue mission. According to a

statement issued by the former Chairman of the Foreign Affairs Committee, "It would have been preferable if there were consultation with Congress under the War Powers Act. Under the circumstances, however, I appreciate and understand the need for secrecy and surprise in this kind of operation." Here is a case where the author of the War Powers Resolution excused the failure of President Carter to comply with the resolution on the grounds that secrecy and surprise are essential to military operations.

However, to excuse noncompliance with the War Powers Resolution on the grounds that secrecy and surprise are essential to military operations is to admit that the War Powers Resolution is totally unworkable. No antiterrorism military operation can be planned in the public eye without risk of exposure to terrorist organizations. Advance consultation in these circumstances will only lead to greater loss of American servicemen.

In fact, there is some evidence that the advance consultation provided by President Reagan before the recent Libyan airstrikes led to leaks on the part of some Congressional leaders. The WALL STREET JOURNAL noted that two hours after the President consulted with Congressional leaders before the airstrikes on Libyan terrorist bases, speculation about the raid was on the network news. Congress is not a very good place to store our national secrets. As THE WALL STREET JOURNAL ruefully commented, "The U.S. Congress is a sieve."

THE NEED FOR SWIFT MILITARY OPERATIONS

Consultation has been curtailed in some cases in order to permit speedy military operations or to maximize secrecy and surprise. The U.S. has had to evacuate American citizens threatened by hostilities on short notice, and did not have time to consult with Congress for opinions on the planned operation. Frequently, these military operations are carried out in a matter of hours and the Congress could not approve the operations in such a short time period. In other case, secrecy would have been lost as a result of full consultation.

Counterterrorism requires a swift military response. As a rule of thumb, Israeli Army doctrine maintains that retaliation must take place no later than 72 hours after the terrorist attack to be effective. Do any of my colleagues believe that Congress could study and approve the plans for proposed military operations against terrorists within 72 hours? I honestly do not believe that we can routinely act that quickly. Only the President can take this military action with sufficient speed to be effective. Our bill ensures that after the President takes any antiterrorism action he will come to Congress and justify the military operations to the Congress. We also have a specific provision in our bill to ensure that the balance in the Constitution is not altered.

It is interesting to note that many in Congress, including the authors of the War Powers Resolution, have excused noncompliance with the Resolution in moments of crisis. We know that the principal author of the House War Powers Resolution on the grounds that secrecy is crucial to military operations. I believe that the Anti-Terrorism Act is fully consistent with this viewpoint.

CONCLUSION

The United States needs a clear counterterrorism policy. The President has proposed a strategy based on economic sanctions and military retaliation. I believe that this would be an effective policy for America. However, this policy can only be implemented if we establish that internationl terrorism is a form of warfare against the United States. Our bill does this.

Our bill is also an attempt to instill a measure of flexibility in the War Powers Resolution in order to improve our ability to combat international terrorism. The Anti-Terrorist Act of 1986 establishes an emergency exemption to the War Powers Resolution for antiterrorism operations. I believe that an exemption for antiterrorism operations is sorely needed.

Chairman FASCELL. Congressman Hunter, would you like to make a statement?

STATEMENT OF HON. DUNCAN HUNTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HUNTER. Sure, I would like to speak a moment.

I support strongly the Barton-Dole bill. Let me make just a couple of points.

I don't have any written statement for the record, but I think Mr. Barton has covered it pretty clearly. Let me make just a point or two to you.

This bill does render the War Powers Act inapplicable with respect to terrorism. I think that should be clear. That should be stated up front.

When we enter into a war, a conflict like the Vietnam war, you have several decisions. First, a decision as to whether you enter, the policy decision in which Congress should be involved, and I think the War Powers Act was intended to address that.

The second decision that has to be made or set of decisions is how you carry out that war. If the proposition is accepted that we are constantly at war with terrorists; that is, that the United States will strike quickly against those who have taken American lives and will strike quickly to preempt plans and programs that would take American lives, then you have passed the first question. There is no need for Congress to have a meeting with the President to decide that we will retaliate against terrorism or that we will attempt to preempt terrorist activities.

So for that reason, this consultative situation that Mr. Barton spoke of and particularly the giving of permission to the President to strike has really been—that point has already been passed, I think, with respect to terrorism.

I heard a little bit about what Mr. McHugh's proposition was and as I understand, there was talk about a consultative body. In my estimation the leaders of both Houses of Congress and from both parties have already been chosen by their fellow Congressmen and Senators and our leadership is clearly defined. Our chairman, ranking members of committees and our leadership in the full conference and full House. If the President wants to talk to the House, he already has a leadership that we have defined and I don't think we need to set up a new standing body that will be involved in decisions regarding terrorism.

We know who our leaders are.

I think we have to look at what happened in the Libyan situation. We had unfortunately a Senator who unfortunately said things to ABC News and had Sam Donaldson saying, Senator Pell couldn't tell us what is going to happen, but watch ABC News tonight at 9 o'clock, the President is going to have a statement for you.

At this same time, the President and his people were trying very hard to carry out the day's activity as if nothing was going to happen. As I recall, he carried out his intention, the press was told he would be going to Senator Laxalt's lamb roast or some other

event of that type and it wasn't until the last minute that he had the 9 o'clock meeting.

I think it is reasonable to assume that if the Soviets had been in the loop on this one, when you have international television, what was being said by Sam Donaldson regarding Senator Pell's remarks was at that very instant being broadcast in Libya. If you had sharp, alert Soviets those air defenses would have been up. I think it was a reasonable assumption that the President wasn't going on TV at 9 o'clock and tell the American people what he had not done. I think it is obvious he was going to tell them what he had done.

So unfortunately shortly after we introduced this legislation, and I commend Congressman Barton for this thing, he has been the driving force on our side, we had an example of how unreasonable it is to require the President of the United States to tell Congress and inform and consult with Congress in these situations which involve a real exigency, a real emergency.

If I had a lawyer and was making a case out of this, a court case, after the remarks were broadcast by ABC News 30 minutes before our planes were over target, I would very simply at that point have rested my case and I don't think I would have needed a final argument.

Chairman FASCELL. Gentlemen, thank you very much. We appreciate your giving us your views.

Mr. Hyde.

LEGISLATION IMPLIES LACK OF INHERENT EXECUTIVE POWER TO FIGHT TERRORISM

Mr. HYDE. Thank you, Mr. Chairman.

I don't know two Members that I prize more than Mr. Barton and Mr. Hunter in this House. You are very thoughtful and you have made a contribution to the whole discussion of a very murky but highly important area in our law. I have a couple of problems with your legislation, however.

First of all, conceptually I think you assume by wanting to have a statute that the President doesn't have the inherent or implied right to strike at terrorism, that somehow the War Powers Act inhibits that.

The War Powers Act—I am not a fan of the War Powers Act for a couple reasons. I don't like timetables. I don't like telling our adversaries if they hang in there, in 60 days we are going to have to do something. I like to keep them guessing.

I believe that no military operation can long endure without the support of Congress, certainly the Vietnam tragedy had congressional support for a long time without a formal statute that gave 60 days and 90 days and that sort of thing, but that is beside the point.

You will recall President Carter when we had the ill-fated rescue attempt in Iran did not provide notification and quite properly so in my judgment on the question of security. When you put something into a statute, you are assuming then to fill a need and it would be my position that the President has the right to strike at terrorism whenever and wherever he thinks it is necessary, but I

also think that the President ought to—and this is another problem I have with your bill—consult when feasible and your bill does not advert to consultation.

SUPPORT FOR CONSULTATION PROCESS

Now, you are happy with President Reagan. I am happy with President Reagan. But President X, Y, or Z down the line, I may feel a little less sympatico with his views. I may damn well want consultation when feasible. I think that ought to be cranked into the legislation. A legal obligation to get on the phone, get on the radio in as practical and practicable way as possible to let Congress in on what he is doing because these things have great consequences.

You go bomb the oil fields somewhere and international repercussions result. So I would like to see some consultation required here when and where feasible and give the President flexibility, but it ought to be mentioned.

Second, I just have a problem with the underlying assumption of your legislation that the President needs this to respond to terrorism. I don't think he does.

NONAPPLICABILITY OF WAR POWERS RESOLUTION TO COUNTERTERRORISM POLICY

Mr. BARTON. Mr. Hyde, if I could respond to that.

I think there are several points that need to be made.

Right now, there is uncertainty. I think everybody would admit to that, that there is at least uncertainty about just what authority the President does have with regard to the War Powers Resolution. Again, in my opinion what we have is basically a gentleman's agreement between the Congress and the President that there is this fuzzy area. As Chairman Fascell indicated in his opening remarks, he didn't really think the President consulted with the Congress in the Libyan air strike situation.

There are going to be those Members that will be using—that could use the War Powers Resolution to hamstring our new counterterrorism policy.

Now, that is perfectly permissible in our open democratic system, but still if we are going to have an effective counterterrorism operation, I don't think it is an unwise decision to realize that the War Powers Resolution was never intended to apply to terrorism, to go ahead and exempt it and explicitly give the President that authority.

TERRORISM AS DEFINED IN H.R. 4611

Mr. HYDE. Mr. Barton, you will recall the recent incursion by the Sandinistas in Honduras some 21 kilometers in force and what if a President—there has always been great speculation by some Members that this President wants to involve our troops in Nicaragua. Here was an excuse. What if the President were to say this is an act of terrorism on Honduras, our ally, our friend, our compatriot, and so we are going to punish them and we are going to bomb Managua because of what they have done.

And they were guilty of an act of terrorism and I really don't have to tell anybody or notify or get approval—we are going to hit Managua.

Well, the roof would go off around here but within the parameters of the concept of what you say here, he could do that and not violate the spirit or the letter of the War Powers Act or this.

Mr. BARTON. If you read the definition of what terrorism is in our bill, that does not fall within the definition of "terrorism."

It wouldn't be against the U.S. civilian population, it wouldn't be a political threat to intimidate the American citizenry, so we have some very narrow definitions of just what terrorism is.

SUPPORT FOR INCLUSION OF CONSULTATION PROVISION IN H.R. 4611

Mr. HYDE. It could well have been against civilian populations and he could describe it as such.

What I am really asking is would you consider putting a paragraph in here that requires the President to consult where and when feasible or practicable?

Mr. BARTON. Congressman, I have no problem with that. I have no problem if we can get your name on the bill by inserting that paragraph. I have a feeling we have got a deal.

Mr. HYDE. Well, we will talk about that later. That was my major problem plus the notion that the President needs this bill to react where I don't think he does.

Mr. HUNTER. If I could just answer briefly and we will be done here. I agree with you, that I have a problem with the War Powers Act and whether it is really constitutional and whether it really rightfully inhibits the President's rights as Commander in Chief.

But the War Powers Resolution does say that the President, "wherever possible," I believe is the word, will consult before introducing hostile forces or entering.

Mr. HYDE. Do you have any problem with those words, if possible will consult?

Mr. HUNTER. I do that in again that doesn't say where feasible. I think "where feasible" is a good term because that eliminates the situations like the one we just had where secrecy was absolutely vital. In fact it was possible for the President to consult and yet because of some unfortunate statements if the Soviets had been in the loop and if they had been sharp we might have had some casualties because of some upgraded air defenses.

So word did get out that something was probably going to happen. So, no, I don't mind the consultation where feasible or after the fact as soon as possible, and I think that that is reasonable. I think, of course, every President is also a politician and historically all our Presidents have been very anxious to get Congress involved in their activities. And you know the President was the loneliest guy in the world when those helicopters and aircraft crashed in Iran. There were few people in Congress who wanted to embrace that particular plan.

So we will never be able to—I think Presidents always want to involve Congress and get the support of Congress and I think they will do that anyway. But I think that is a reasonable request and I think we should put it in there.

But there is confusion on whether the War Powers Act applies to these situations. I think that is an accepted fact and this would clear up that confusion.

CONSULTATION SUBJECT TO DIFFERING INTERPRETATIONS

Chairman FASCELL. Can I suggest something at this point? The term "consultation" is clearly subject to differing interpretations. I might say that a particular action is notification, somebody else might say it is consultation, somebody might say, it should have been prior rather than after the fact. It is a basis for discussion, and it is nothing new, trying to find a method of accommodation under the Constitution between the President and the Congress.

There is no problem there that I see. Furthermore let me suggest this to you as to another reason why the point that the gentleman from Illinois made, Mr. Hyde, is a very valid point.

PRESIDENT CLAIMED COMPLIANCE WITH WAR POWERS RESOLUTION

Your legislation presumes that the President needs new authority to respond to terrorism. But the President acted against Libya and also complied with the War Powers Resolution. He found no difficulty in complying. He even filed a report that cited the War Powers Resolution.

Mr. BARTON. But, Mr. Chairman, am I incorrect in my interpretation of your remarks earlier in the newspapers that you had some concern as to whether he complied with the War Powers Resolution?

Chairman FASCELL. Why of course, that is the purpose of the War Powers Resolution, to have the kind of dialog we are having right now in order to help institutionalize or to bring about in better fashion the kind of consultation that is absolutely essential between an Executive and the Congress.

Of course. The only point I am making is to say, the President has not complied with the resolution because he didn't consult. He simply notified. The President says, I did comply with the resolution, I consulted with the Congress.

OK?

We have a factual dispute. It may be fundamental but it is not irreparable. It didn't stop the President from carrying out his responsibilities, as he saw them, under the Constitution.

The President went even further and said, under the reporting requirements of the War Powers Resolution, I am submitting a report to the Congress. So he had no problem with the War Powers Resolution at all.

Mr. BARTON. I don't deny that.

Mr. HUNTER. But he had a problem with your interpretation of it.

Chairman FASCELL. I know, but I am not President. Just an old country lawyer trying to get along.

Mr. BARTON. We have heard that before, old country lawyer. President Carter in the Iranian situation that Congressman Hyde referred to, his interpretation of the War Powers Resolution, the consultative requirement, was he planned to inform the Congress

the day after and consult them. So he has a different interpretation.

Second——

Chairman FASCELL. No, no, excuse me, I am sorry to interrupt you. That——

Mr. BARTON. That is what is——

GENERALLY RECOGNIZED EXCEPTIONS TO WAR POWERS COMPLIANCE

Chairman FASCELL. The question there was not introducing Armed Forces of the United States into an area of hostility, although it might have created a lot of hostility had they been successful.

Mr. BARTON. That is true. But the fact remains, Mr. Chairman, that no——

Chairman FASCELL. I wasn't quite finished. I just wanted to point out that the action contemplated was an exception under generally recognized precedent. In other words, there was no absolute construction of the Constitution in the sense of Congress having to declare war before the President could act to save the lives of American citizens.

President Reagan used that exception, generally recognized, with Grenada. He is using that generally recognized exception even in its application to terrorism. So the President can act.

What Mr. Hyde has said, and I think it is a very valid point—I certainly agree with it—is that nothing should be done which in any way would indicate that there is a restriction upon the President's constitutional right to act. That is something we all need to think about. We can still have our discussions about the best and the most proper way to bring the Congress into the loop. That is legitimate. That is one of the purposes of this exercise.

So, while I don't agree with your legislation, I think you have served a very important function in highlighting the whole purpose of this discussion. Your bill provides a forthright, direct approach to the problem by saying: Let's take the Congress out of the loop in cases of military responses to terrorism.

That leads to the question of, would you want to take the Congress out of the loop on some other exceptions which are equally as strong in their legitimate purpose?

Mr. BARTON. Mr. Chairman, you are obviously a much better educated person in this area.

Chairman FASCELL. I wouldn't say that education takes the place of common sense.

Mr. BARTON. I would like to point out that in the—first of all, our bill requires the President to inform the Congress of these acts. Second, it doesn't preclude the President from consulting with the Congress.

Chairman FASCELL. Exactly.

EXEMPTION OF COUNTERTERRORISM OPERATIONS FROM REQUIREMENTS OF WAR POWERS RESOLUTION

Mr. BARTON. Third, in the instance of the Libyan situation that was not an action that they planned Sunday afternoon or Monday afternoon. That had been going on for at least 1 week, 1½ weeks,

the planning for that, and reasonable men could agree that the consultative requirement of the War Powers Resolution required the President as soon as they began to develop the policy options to get in touch with somebody in the Congress and bring them into the loop and once you do that, reasonable men can agree that given our open system there is every reason to believe that the secrecy goes out the window and the very success of the window goes out the window and there may be people who for whatever reason don't want us using any type of a military force to combat terrorism and they would do everything they could to hamstring it.

So as you indicate, what we have done in this legislation is take it head on and say there is an exception, the War Powers Resolution was never intended to deal with terrorism, so let's explicitly exempt it from the the War Powers Resolution and explicitly give the President the flexibility to get the job done.

That may be too straightforward an approach, but it is certainly an approach that is deserving of consideration and I appreciate the opportunity to bring it before your committee.

IMPLICATIONS OF PRESIDENT'S POLICY ON TERRORISM

Chairman FASCELL. We are delighted you did, because you made an important contribution to our consideration of this matter.

I won't ask you to answer this question now, but the President has enunciated a policy, the Congress has been notified, we know exactly what it is. Now, we decide that state-sponsored terrorism emanates from Moscow, for example, and we have a direct link.

Does the President, on his own, simply undertake to respond militarily in an act of punishment? Does he undertake on his own to commit the United States to that act? That is something we have to think about.

Mr. HUNTER. I think you point out a good question, Mr. Chairman. You've got exactly the same problem on a smaller scale with Qadhafi where he is a terrorist but he is also a head of state.

Chairman FASCELL. I understand that.

Mr. HUNTER. That is something where, regardless of the War Powers Act, we have to rely on the President's discretion.

Chairman FASCELL. I am perfectly willing to rely on the President's discretion, depending on who he is. That is the problem. I don't know who the next President is going to be. Is Congress going to be taken out of the loop on major decisions of that kind? What your legislation does is abolish that question.

DIFFICULTY OF DEFINING TERRORISM

Mr. HUNTER. It does take the War Powers Act, make the War Powers Act inflexible to terrorism and in talking with the people on Senator Dole's staff, and I presume Congressman Barton did the same thing, the entire record that was laid out for the War Powers Act was devoid of even the word "terrorism." As someone who was instrumental, in putting that act together, my question to you would be and it is a great opportunity to ask it, in your mind, was it contemplated that the War Powers Act would cover terrorism when you put it together?

Chairman FASCELL. Terrorism has indeed been discussed. We spent several years in this committee and in the Congress trying to reach definitions. I admire you and your cosponsors because you did it right away. But we spent 4 years trying to reach an agreement on what terrorism was, and you know what? We never did reach an agreement.

Now, that may not be reflected in the words of the War Powers Resolution, but I can assure you it was part of the proceedings of this committee. It was a very serious matter, trying to reach definitions with respect to terrorism to lay the foundation for action by the United States.

The wording in the resolution with respect to introducing the Armed Forces of the United States into hostilities where they are equipped for combat was very carefully crafted.

CAUTION REQUIRED ON BLANKET EXCEPTIONS TO REQUIREMENTS OF WAR POWERS RESOLTUION

We had in mind, of course, exceptions whereby the President could act based on precedence and acquiescence and acceptance of the American people.

But I am not sure we are ready to make a blanket exception that says no matter how severe the response would be or what repercussions would ensue, that you would simply isolate the President out there on his own. I question whether we ought to go that far. That gives me some concern aside from the pure constitutional question.

I am talking about the politically desirable approach where you would have both parties and the Congress fully supporting the President on a major commitment of that kind.

Mr. HUNTER. Of course where this would take us, the War Powers Resolution was passed in 1973 or 1974, so it would take us back to where we were in the 190-some years of this country before we had the War Powers Act. It would do no more and no less with respect to terrorism.

Chairman FASCELL. That is agreed, but the War Powers Resolution does no more or less than the Constitution because no statute can change the Constitution.

IMPLICATIONS OF PRESIDENT'S POLICY STATEMENT ON TERRORISM

Mr. BARTON. Mr. Chairman, I think the hypothetical question you asked with respect to Moscow and the link to terrorism——

Mr. HUNTER. Mr. Chairman, I have to leave real quickly for a fast whip meeting.

Chairman FASCELL. We are about to wind it up anyway. But thank you very much for coming.

Mr. BARTON. One final comment on your hypothetical question. One would assume that the President, before undertaking any type of an activity that you contemplated under that question, would want to consult with the Congress, would want the support of the American people, would want to do all the things that you and I agree need to be done, and this legislation doesn't preclude that at all.

Chairman FASCELL. No.

Mr. BARTON. To take the most negative connotation to its ultimate conclusion, you are assuming that the President is a paranoid depressive who perhaps wants to take the U.S. people down the garden path and I am not saying that can never happen, but I have confidence in who the American people elect as President, Mr. X, Mr. Y, or Mr. Z, that it would not happen.

Chairman FASCELL. I agree with that, and I also have full confidence in the Congress in fulfilling its responsibility under the Constitution, otherwise we would do away with the system. So, what it boils down to is a question of reasonableness and an accommodation in the best interests of the people of the country.

I think we could both agree that the best way to do that would be to have the Executive and the Congress working together as willing partners in the best interests of the country.

WAR POWERS RESOLUTION DESIGNED TO FOSTER EXECUTIVE-CONGRESSIONAL CONSULTATION

The War Powers Resolution was designed to help foster better communication between the President and the Congress on the assumption that that kind of communication is essential. We did not intend in any way to impinge on the powers of the President under the Constitution, because no statute can do that, only a change in the Constitution could do that.

One of the benefits of the War Powers Resolution, aside from that, has been that we in Congress can raise questions with respect to the President's action while supporting him.

This is a long, hard struggle—reaching an accommodation of this kind. We have found that where a President deems it useful, for example, he complies with the War Powers Resolution and has no problem with it.

When the President decides that he doesn't want to bother with it he disclaims it and says war powers doesn't apply.

It is up to us in the Congress, then, to make our judgment one way or the other. We will do the best we can.

But you have made an important contribution to our dialog and I want to thank you very much and the others who were cosponsors of your legislation and we will all be following this because this is not the end of it. I guarantee you that.

Mr. BARTON. Thank you, Mr. Chairman.

Chairman FASCELL. So we will have plenty of opportunity.

Thank you very much.

The subcommittee stands adjourned subject to the call of the Chair.

[Whereupon, at 12:12 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX 1

Letter From Chairman Fascell to President Reagan Concerning Deployment of American Naval Forces Off the Coast of Libya (March 24, 1986) and Response Thereto (March 26, 1986)

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

Your recent policy decision involving the deployment of American naval forces off the coast of Libya has been a matter of great concern to me. That concern was heightened this morning by reports that an American aircraft was fired on by a Libyan missile.

I write you in the context of my oversight responsibilities for full implementation of the War Powers Resolution. As the original House sponsor of that legislation I have an abiding determination to assure full compliance with the law.

Like you, I recognize that the actions of Libyan leader Qaddaffi are contemptible in every respect. His repeated support for terrorism and his direct aggression against neighboring states merit the world's harshest condemnation.

In pursuing policies intended to offset Mr. Qaddaffi's actions, I am sure you would agree that we must respect and abide by our own laws and constitutional procedures. In that connection, I believe your Administration's actions in the Gulf of Sidra have failed to adequately satisfy the requirements of the War Powers Resolution.

As demonstrated by today's reported attack, these deployments constituted from the outset a situation where imminent involvement in hostilities was a distinct possibility clearly indicated by the circumstances even prior to today's development.

Under the circumstances, prior consultation with Congress was required under the War Powers Act.

In view of these circumstances, I respectfully urge you to comply fully with the provisions of the War Powers Resolution before the situation evolves further.

With best wishes, I am

Sincerely yours,

Dante B. Fascell

Dante B. Fascell
Chairman

DBF:jby

THE WHITE HOUSE

WASHINGTON

March 26, 1986

Dear Mr. Chairman:

I am responding to your letter of March 24 to the President regarding your perceptions of the actions we have taken in the Gulf of Sidra.

First, our maneuvers in the Gulf have long been planned, as part of a global freedom-of-navigation program by which the United States preserves its rights to use international waters and airspace. Numerous similar prior operations did not provoke a response. We obviously cannot be deterred from exercising our rights by Qadhafi's legally baseless claims or by his threats.

We disagree with your claim that our "actions in the Gulf of Sidra have failed to adequately satisfy the requirements of the War Powers Resolution." Nor do we believe that the Resolution was intended to require consultation before conducting naval maneuvers in international waters or airspace. We considered this question carefully and concluded that conducting the operations did not place U.S. forces into hostilities or into a situation in which imminent hostilites were clearly indicated by the circumstances. Contrary to your letter's suggestion, it is not enough under the statute that an operation create "a distinct possibility" of hostilities. After Libya attacked our forces, we notified congressional leaders.

Our plans in this instance have been know to all, including Qadhafi himself. The very purpose of the present operation has been to exercise our rights, openly and unambigiously.

With best wishes,

Sincerely,

William L. Ball, III
Assistant to the President

The Honorable Dante B. Fascell
Chairman
Committee on Foreign Affairs
House of Representatives
Washington, D.C. 20515

APPENDIX 2

Chronology of Events Relating to the April 14, 1986, Raid on Libya

Saturday, April 5

1:49 a.m. Berlin Time. A bomb exploded in the La Belle discotheque in West Berlin killing a U.S. soldier and a Turkish woman and injuring 204 people, including 64 Americans.

Sunday, April 6

New York Times: "President Reagan was asked before boarding Air Force One for the return trip to Washington if he would hit Libya and responded, 'No comment.'" (New York Times, April 7.)

Secretary of Defense Caspar Weinberger: "We don't have the hard evidence [against Qaddafi] * * * but when there is evidence, we wouldn't hesitate to act for a moment." (NBC "Nightly News," April 6.)

Monday, April 7

U.S. Ambassador to West Germany Richard Burt: "There are very clear indications that there was Libyan involvement [in the Berlin bombing] * * *" When asked whether he would like to see the President take military action against Qaddafi, Burt replied: "I'm not going to close the President's options. * * * He's studying this issue right now. * * *" (NBC "Today Show," April 7.)

Washington Post: "The White House yesterday [April 7] privately rebuked Richard Burt, U.S. Ambassador to West Germany, for saying in a television interview that the United States has clear indications of Libya's involvement in the weekend bombing of a West Berlin nightclub. U.S. officials confirmed, however, that Burt's statements were correct. * * * The officials, who declined to be identified, said Burt had been warned to be more circumspect in public statements, not because he had spoken incorrectly but because, as one official put it, 'he got too far out in front of what the administration wants to say publicly at this point.'" (Washington Post April 8.)

CBS "Evening News": "Reagan Administration officials say they have intelligence reports strongly linking the Libyan People's Bureau in East Berlin with the bombing of the La Belle discotheque in West Berlin. The evidence includes intercepted messages dispatched from Libya to its operatives in East Berlin. Top U.S. officials acknowledge that detailed military contingency plans for retaliation already exist. Said one source, they involve five targets in Libya." (White House Correspondent Lesley Stahl, CBS "Evening News," April 7.)

ABC "World News Tonight": "U.S. intelligence sources say that after the [Berlin] bombing, there were messages from Libya to its embassy in East Berlin which indicated clear knowledge of details of the terrorist attack and which in essence offered praise for a job well done." (National Security Correspondent John McWethy, ABC "World News Tonight," April 7.)

Wall Street Journal: "U.S. officials are putting out the word that they are laying the groundwork for possible retaliatory actions against Libya for its suspected involvement in the bombing of a West Berlin discotheque. * * * U.S. officials said they won't decide on any of several possible retaliatory measures now being studied by President Reagan until investigators in Berlin make more progress * * * Options that U.S. officials have discussed include striking unmanned planes on an airfield, Libya's two SAM-5 missile sites, or missile-storage area * * * Other retaliatory options are aimed at striking at the heart of Libya's economy, by bombing oil lines or transportation." (Wall Street Journal, April 8.)

Tuesday, April 8

White House Press Briefing: "Q: So, just to reiterate, you have not now at this time made a conclusion as to the extent of Libyan involvement in either the two incidents of last week? [White House deputy press secretary Larry Speakes]: That's right." (White House afternoon press briefing, April 8.)

Wall Street Journal: "Reagan and his advisers are united in wanting to respond militarily against Qadhafi * * * but haven't agreed on a time or place to strike back, a senior Administration official said." (Wall Street Journal, April 9.)

New York Times: "One State Department official, who was openly skeptical about the evidence used to link Libya to last December's Rome and Vienna airport attacks said today [April 8] that 'I have absolutely no doubt this time. We have the goods.'" (New York Times, April 9.)

CBS "Evening News": "Forty-eight hours after the bombing in West Berlin the Reagan Administration had reached a consensus for military retaliation against Libya. But, officials are still trying to decide exactly what to do and when. Sources tell CBS that the evidence, most of it from communications intercepts, seems to implicate Libya beyond much doubt * * * What are the options? The easy targets are on the coast—the Libyan missile battery already hit during the operation in the Gulf of Sidra, a submarine base, other port facilities and artillery positions. More risky: terrorist training camps. Military planners say daylight action inland would probably mean the loss of some pilots and aircraft. But the White House believes there is public support as do many in Congress. (White House Correspondent Bill Plante, CBS "Evening News," April 8.)

Wednesday, April 9

Events of the Day That Were Known at the Time

USA Today: "By 3 p.m., two U.S. aircraft carrier battle groups were ordered to remain in the Mediterranean." (USA Today, April 10.)

New York Times: "Several of the [Administration] officials said sensitive information was being shared with West Germany, Britain, France, Italy and a few others, but that not all were being shown the same raw evidence." (New York Times, April 10.)

CBS "Evening News": "According to a highly-placed source President Reagan has approved another possible military strike against Libya. * * * The White House denied rumors today that a military response was already underway, but a well-placed intelligence source said that a military response has been approved." (White House Correspondent Lesley Stahl, CBS "Evening News," April 9, and USA Today, April 10.)

ABC "World News Tonight": "The understanding now is that a strike against Libya is in the works. If it comes to that, seldom will US military action have been so widely and publicly advertised in advance." (Sam Donaldson, ABC "World News Tonight," April 9.)

Asked directly whether he had already authorized military retaliation against Libya, the President said: "This is a question that, as I say, is like talking about battle plans or something." Stating that the Administration was still looking for proof, he concluded that "if there's identification enough to respond, then I think we'd respond." (President Reagan, News Conference of April 9 Transcript in Washington Post, April 10.)

Events of the Day That Were Subsequently Reported

Washington Post: "At about the middle of last week [April 6-12], officials from Reagan's National Security Council contacted their counterparts in Thatcher's Cabinet Office. The Americans said that the Administration had decided to take military measures against Libya, and wanted both British backing and approval for use of Royal Air Force bases where U.S. Air Force F111s and some aerial refueling tankers are stationed. * * * Her staff requested that the NSC provide specific information on the types of bombers that were to be used, and on the intended targets." (Washington Post, April 16.)

New York Times: "The discussions [with the British] began late on Tuesday [April 8], almost a week before the raid. * * *" (New York Times, April 18.)

On Wednesday, April 9, five days before the raid, the President was authoritatively reported to have approved in principle the decision to retaliate militarily against Libya.

Washington Post: "Sources said that a formal national security decision directive was signed last Wednesday [April 9] in which Reagan approved an attack on Libya 'in principle'. * * * By Wednesday [April 9] * * * Shultz and Poindexter were ready with their recommendation for a military strike. Reagan approved the decision in principle at a National Security Council meeting in the Oval Office after hearing a recommendation from Adm. William J. Crowe, Jr., chairman of the Joint Chiefs of Staff, who called for adding firepower to U.S. forces before any strike was made." (Washington Post, April 15.)

Sam Donaldson on ABC "Nightline," April 14: "Officials here [Washington, D.C.] say the President decided on a military option at the middle of last week, say Wednesday, Wednesday morning, and from that moment on, they insist there was never any doubt that it would be used." (ABC "Nightline," April 14.)

Thursday, April 10

Events of the Day That Were Known at the Time

NBC "Today Show": "Administration officials say that intense planning is under way for retaliation against Libya. At his news conference the President only hinted at it. * * * And when given the facts the President did not deny that he has already ordered military retaliation. Afterwards officials said that omission was very significant and said pointedly that when the time is right the United States will respond." (White House correspondent Andrea Mitchell, NBC "Today Show," April 10.)

Washington Post: "The United States, * * * now had 'indisputable evidence' that Libyan leader Muammar Qaddafi was behind the [Berlin discotheque] attack, according to NATO commander Bernard W. Rogers. * * * Gen. Rogers, speaking in Atlanta Wednesday [April 9], said, 'We have indisputable evidence. * * * I can't tell you how we get it. But it's there.'" (Washington Post, April 11.)

At the White House, deputy press secretary Larry Speakes was asked if reporters could assume that Rogers "knows what he is talking about." Speakes replied: "I'm sure you can." (White House afternoon press briefing, April 10.)

New York Times: "An Administration official said that Libyan military sites are the prime options under consideration for retaliation, and that among the key possibilities are Libyan air bases near the coast. * * * The official said that coastal electronic listening posts, including early-warning radar sites as well as units that pick up airplane and ship traffic, are also targets. * * * Although oil fields and oil depots are also under construction, one United States official said that destruction of such sites could create problems for the United States because friendly nations, particularly Italy and West Germany, buy oil from Libya. Moreover, a number of Americans are believed working in or near these sites, despite Mr. Reagan's recent order for Americans to leave Libya." (New York Times, April 11.)

New York Times: "Administration officials conceded that, if President Reagan orders a military strike, 'clearly the surprise won't be there,' The official added * * * 'The Libyans know as well as we do what the major targets are.'" (New York Times, April 11.)

NBC "Nightly News": "At the President's direction the Pentagon is making final plans for a retaliatory strike against Libyan military bases and perhaps industrial sites That according to defense officials who told NBC News that the President has approved in principle an attack of short duration which would destroy many targets. The sources said the carriers *Coral Sea* and the *America*, currently within 24 hours of the Libyan coast, would not be ordered into action until the President reviews the battle plan with his top advisers. They would include Vice President Bush, who is due back from the Middle East late Saturday, and Defense Secretary Weinberger who returns from Asia Sunday.

* * * Defense officials said the President's military options are all keyed to the four main air defense missile sites along the Libyan coast. Those batteries would have to be destroyed first. Only then would bombers be sent to attack three large military airfields. The F-111 bomber is one of the weapons the President could use together with carrier jets. The F-111 is based in Britain and it is not known if the British government would go along with that use of its territory. But the largest burden of the airstrike would go to the attack jets on the two carriers. Pentagon sources said they would be used against Libyan naval facilities and military bases along the Libyan coast. * * *

* * * It is not clear tonight whether the attack plan to be presented to the President will include a strike against Libyan oil facilities. One Pentagon source said that would expose attack jets to more ground fire than is acceptable, and there is that same concern with striking Libya's many terrorist camps—the majority of which are in the Libyan interior out of safe bomber range. But one official said there are several near shore which could be attacked.

* * * Those are most of the options for the President and according to defense officials, it is no longer a question of whether he will employ one or all of them, but when." (Fred Francis at the Pentagon, NBC "Nightly News," April 10.)

Friday April 11

Events of the Day That Were Known at the Time

NBC "Today Show": "The issue isn't if the U.S. will strike, but when." (Bryant Gumbel, NBC "Today Show", April 11.)

NBC "Today Show": "Defense department sources say the plan would be for a quick strike that could hit the following targets. Military bases near the coast to knock out missile sites and missile storage areas. Military airfields near Tripoli, to hit unmanned jet fighters on the ground. * * * The goal is to strike as many targets as possible as close to the coast to reduce the danger to American aircraft." (Correspondent Jamie Gangel, NBC "Today Show," April 11.)

Reuters: "Pentagon officials said yesterday (April 11) the *Coral Sea* and *America*, carrying 170 planes and escorted by battle fleets of more than 10 ships each, had edged closer to Libya." (Reuters, April 12.)

New York Times: "[White House chief of staff Donald Regan] was asked by reporters * * * whether there now was 'indisputable' evidence linking Libya to the West Berlin disco attack. 'As far as most people are concerned, yes,' Mr. Regan replied * * * 'We haven't reached a final conclusion, but we're coming close.'" (New York Times, April 12.)

Events of the Day That Were Subsequently Reported

AP: "On Friday, when the ships were still about a day's sail from the Gulf of Sidra * * * one Pentagon source said, 'There doesn't seem to be anything imminent at this point.'" (AP, April 13.)

Washington Post: "According to French and American sources, the United States first broached the question of overflight rights with France on Friday, April 11, via the military attache's office in the U.S. Embassy here [in Paris]." (Washington Post, April 24.)

Washington Post: "[Paris daily] Le Monde said that Reagan sent a second private message to Mitterrand on April 11, announcing his intention of using the F111s to attack 'terrorist camps' in Libya and requesting overflight rights." (Washington Post, April 28.)

Saturday, April 12

Events of the Day That Were Known at the Time

UPI: "'As part of our continuing consultations on the threat of terrorism, Ambassador Vernon Walters, the U.S. representative to the United Nations, has undertaken a mission to Europe,' said State Department spokesman Deborah Cavin. 'He is now in the United Kingdom, where he has met with Prime Minister Margaret Thatcher and he will be visiting several other countries in the next few days.'" (UPI, April 12.)

New York Times: "Administration officials speculated that the Walters trip placed in abeyance, at least for the moment, a retaliatory strike against Libya, but officials declined to rule out a raid even in the next 48 hours." (New York Times, April 13.)

AP: "The [British] Mail on Sunday newspaper said Mrs. Thatcher had 'cleared the way for President Reagan to use British bases to launch a massive new air attack on Libya.'" (AP, April 13.)

AP: "Speculation * * * that the United States might be planning to use its F-111 fighter-bombers based in eastern England for a punitive strike against Libya * * * was heightened by the arrival Saturday [April 12] of several KC-10 tanker planes at the U.S. Air Force base in Mildenhall, eastern England. The KC-10, a military version of the DC-10, is capable of in-flight refueling and could be used to enable up to 40 F-111s to make roundtrip flights between Britain and Libya." (AP, April 13.)

AP: "Italian Premier Bettino Craxi told reporters Saturday [April 12] in Milan * * * 'I don't believe there will be a military intervention there [Libya] before Monday,' the day of the Common Market meeting." (AP, April 12.)

NBC "Nightly News": "By Monday, the diplomatic lobbying tour will be complete, and Administration sources indicate that means a strike could come as early as Tuesday. * * * Administration sources say the president is committed to a retaliatory strike, but might be willing to hold off if European allies agree to strong political and economic sanctions. Short of that, said one official, it's just a matter of time until the president picks a plan and gives the go-ahead." (Correspondent Jamie Gangel at the White House, NBC "Nightly News," April 12.)

Events of the Day That Were Subsequently Reported

Washington Post: "After consulting conservative Prime Minister Jacques Chirac by telephone, Mitterrand decided to reject the U.S. request [for overflight rights], and the French refusal was communicated to Washington the following morning [Saturday, April 12]." (Washington Post citing Le Monde, April 29.)

ABC "Nightline": "Officials here [Washington, DC] say * * * General Walters * * * was not sent to try to solicit allied support for this * * * but had been sent to inform the allies that a military option would be used." (Sam Donaldson, ABC "Nightline," April 14.)

Washington Post: "By the time Walters arrived Saturday, most of these details had been ironed out. His meeting with Thatcher along with [Foreign Secretary Geoffrey] Howe and Defense Secretary George Younger, sources said, concentrated primarily on the 'public presentation' of the attack, alter the fact, including the extent to which evidence could be publicly revealed and the legal justification for it." (Washington Post, April 16.)

New York Times "According to Spanish sources here (Washington, DC) and in Madrid, Mr. Walters at a previously undisclosed meeting with Mr. Gonzalez on Saturday (April 12), hinted at the possibility of overflights or use of the bases in the event of a hypothetical American military action against Libya. Mr. Gonzalez, the sources said, gave a thoroughly discouraging response about both." (New York Times, April 16.)

Sunday, April 13

Events of the Day That Were Known at the Time

Deputy Secretary of State John Whitehead said: "* * * prospective military action is something that only the President will decide on. He has not yet made that decision. * * *" "No, there really isn't a time table, but * * * the time is getting short." (CBS "Face the Nation," April 13, and New York Times, April 14.)

Director of the State Department's Office of Counter-Terrorism Robert Oakley said: "I can't tell you exactly what General Walters is talking about, but he is indeed consulting our allies." (ABC "This Week With David Brinkley," April 13.)

Walters met with West German Chancellor Kohl and Foreign Minister Genscher Sunday morning and that evening with French Prime Minister Chirac. (Washington Post, April 14.)

Jiji (Tokyo) Press Service: "When they met at the Presidential Retreat of Camp David * * * last Bunday, Reagan hinted the possibility of attacking Libya, (Japanese Prime Minister) Nakasone said at a plenary session of the House of Councillors. Reagan said that the United States has firm evidence linking Libya to the recent bombing of a West Berlin nightclub * * * On Wednesday (April 16) Deputy White House press secretary Larry Speakes said Japan expressed its support for U.S. attacks against Libya prior to * * * (the) air raids on Tripoli and Benghazi. But this was denied by Nakasone Thursday." (Jiji (Tokyo) Press Ticker Service, April 18)

NBC "Nightly News": "Administration officials say the President is moving toward a decision about whether to make a retaliatory strike against Libya; and White House officials confirm the President will have a special National Security meeting tomorrow to evaluate the situation. * * * Today, the President conferred with Vice President Bush and Secretary of State Shultz, both of whom are believed to favor a military strike. Noticeably absent from the Camp David meeting was Defense Secretary Weinberger, who is believed to oppose such action." (Jamie Gangel at the White House, NBC "Nightly News," April 13.)

Events of the Day That Were Subsequently Reported

Washington Post: "The [Le Monde] newspaper said the White House then sent another urgent message to Mitterrand asking him to reconsider [France's decision made Saturday, April 12, to refuse American overflight rights]. The French refusal was confirmed at a meeting on the morning of April 13 between Mitterrand, Chirac, and Foreign Minister Jean-Bernard Raimond." (Washington Post, April 29.)

New York Times: "Mr Walters said the United States was ready to act," said a ranking aide of the American envoy, and Kohl told him, "Force is not our method." * * * A senior adviser to the Chancellor said Mr. Kohl was "furious" when he read that Reagan Administration officials had described him as willing to condone military action against Libya in private while publicly opposing such a step. "He said nothing like this," the adviser insisted. (New York Times, April 25.)

New York Times "Mr. Craxi's aides too, were shocked to hear him described by Washington officials as having privately endorsed the American raid." (New York Times, April 25.)

The April 21 issue of Newsweek, which was available on newsstands before the raid, contained a lengthy lead article on the possibility of military action against Libya. Using accumulated leaks from Administration officials, it offered a detailed and remarkably accurate analysis not only of what had happened, but also of what would happen.

This time the casus belli was the La Belle discotheque bombing in West Berlin. The President's counselors said they had worked up an "indisputable" trail of evidence connection Libyan agents to the murderous blast. Two U.S aircraft carriers took up positions within striking distance of Libya. Reagan suggested he was only waiting for clear battle conditions and a complete dossier on the Berlin case before striking." * * *

With the USS *Coral Sea* and the USS *America* both in the Mediterranean, one plausible scenario was that Reagan would send Navy jets from the carriers to bomb airfields, missile batteries, radar towers or other military targets along the Libyan coast. * * * United Nations Ambassador Vernon Walters also left on a trip to London, feeding speculation that Washington might try to launch a raid with U.S. Air Force FB-111 bombers based in Britain. The President's advisers were leaning against two other options: trying to take out Libya's oilfields or hitting suspected terrorist training camps." * * *

* * * Thus time, senior U.S. officials said, the Joint Chiefs of Staff laid out a full range of military options for Reagan and the National Security Council immediately after the Berlin bombing. Over the next three days new reconnaissance photos were reviewed and the list of targets was narrowed, then Reagan approved an attack "in principle."

* * * Pentagon officials were determined to stick to the criterion of "proportionality"—and they read that as meaning an attack on limited targets such as the radar array around Tripoli. Then, according to Defense Department officials, the President and his other advisers decided to consider larger targets such as Libya's airfields. The military brass went back to the drawing board." * * *

Of all the options, the most likely to meet Reagan's guidelines was sending jets from the carriers to hit Libyan military positions." * * * The Administration had also not ruled out a longer range hit. From the start the Pentagon had liked the option of dispatching the British-based FB 111s, which can move fast, fly low and carry a heavy bomb-load. At first, according to British officials Prime Minister Margaret Thatcher was cool toward the proposal. But the sources said she warmed up after U.S official let the British see their full file on Kaddafi's links to the La Belle blast." * * * In another sign the Administration might be leaning toward the Britain scenario, several U.S. tanker aircraft, which could be used for inflight refueling, took wing for American air bases in the United Kingdom

The President's advisers rejected other possibilities as too dangerous. The CIA had identified some three dozen camps where it suspected the Libyans of training terrorists. But top U.S officials argued that strikes on those targets might also hit civilians. Senior planners pointed out that an attack on Libyan oilfields, pumping stations and loading docks could endanger innocent oil workers including Americans and Europeans." * * *

* * * Senior officials in Washington echoed reports that U.S. intelligence had intercepted messages between Tripoli and the Libyan People's Bureau in East Berlin in late March, they said, Tripoli instructed the bureau to carry out an undisclosed "plan." On April 4 the bureau informed its capital that the operation would take place soon. Hours later—after the attack on the discotheque—the Libyans in East Berlin reported that they had executed the plan. Then on April 6 Tripoli exhorted other People's Bureaus to follow East Berlin's example." * * *

In the campaign to rally allied support, the State Department sent cables on Kaddafi's links to terrorism to major West European capitals. But only the British were shown raw transcripts of the intercepted Libyan messages. The other allies saw paraphrases. That appeared to explain why the West Germans sounded circumspect about the evidence in the La Belle case, even though they verified the thrust of Washington's allegations. * * *" ("Targeting a 'Mad Dog,'" Newsweek, April 21, 1986—released April 13, 1986.)

Monday, April 14

The Day of the Raid

NBC "Today Show": "A high official said in Moscow this morning the Soviet government is in contact with Washington in efforts to prevent a U.S. attack on Libya. * * * At the White House, President Reagan meets today with his top advisers in what could be a crucial meeting on the Libyan crisis." (News Anchor John Palmer.) "Many observers believe—even those who originally thought that a military response would be a mistake—that the President has now talked so tough that he almost has to do something, in order to preserve American credibility on this issue." (White House Correspondent Andrea Mitchell, NBC "Today Show," April 14.)

12:13 p.m., EST: 18 US F-111s depart from Britain.

4 p.m., EST: The President consults with Congress for the first time as top congressional leaders are told of the military operation which is already in progress. (Washington Post, April 15.)

Representative Robert Michel, who attended the briefing, said: "* * * we got a complete briefing on the nature of the strike and how it was to be deployed and the purpose for taking that kind of action. * * * There certainly were some serious questions asked by members, and I think rightfully so, particularly for those of us who, while hearing reverberations that there might be some kind of strike of this nature but not knowing for use and having not been counseled or asked for our comments before that meeting." * * *" (ABC "Nightline," April 14.)

Asked whether this constituted proper consultation with Congress under the War Powers Act, Representative Dante Fascell, who also attended the briefing, responded "Well, we were informed of a decision." (ABC "Nightline," April 14.)

6:30 p.m. ABC "World News Tonight": "A debate at the highest level of the Reagan Administration raged right through the weekend about how best to deal with Qaddafi. Officials say arguments were so intense that the President late last week was unwilling to order a military strike until differences among his top advisers could be narrowed. They now have, officials say, and plans have been set into motion to order a military strike

One major reservation expressed late last week was the need to more fully consult

with America's allies. Over the last two days, U.N. Ambassador Vernon Walters has done that consulting. * * * There were other concerns about not having enough military muscle on the scene. Two aircraft carrier task forces with 160 planes on board are standing by just north of Sicily—a quick run from Libya. Additional KC-10 tankers, used in air-to-air refueling, have been flown to bases in Britain—available for duty should the Administration decide to use Air Force F-111s in a strike.

Another concern was the lack of secrecy. Today Defense Secretary Caspar Weinberger issued a tough new order for no one to talk about details of ship or plane movements. Other reservations, many of them said to be raised by Weinberger, include concern that civilian casualties—Libyan, European, and American—be minimized and that American pilots be exposed to the lowest possible risk. Though differences among high-level advisers still exist, officials say once the President signed off on a plan for action the debate stopped. Now all attention is focused on making sure the plan works." (National Security Correspondent John McWethy, ABC "World News Tonight," April 14.)

7.00 p.m. EST: American planes bomb Libya.

9.00 p.m. EST: President Reagan discusses the attack on Libya in nationally televised address.

11.30 p.m. EST: On ABC "Nightline," Ted Koppel declared: "It has been in the wind for days. For a time, in fact, the move toward military action was so blatant that it looked like a bluff." (ABC "Nightline," April 14.)

The Aftermath

A statement released by the office of Canadian Prime Minister Mulroney: "The government of Canada has been fully consulted by the United States all along and was notified in advance of its intentions with respect to Libya." (NEWSCAN [newsletter of the Canadian Embassy], week of April 18, dateline Ottawa, April 15, 1986.)

White House morning press briefing:

Question: "Was his [President Reagan's] decision [made Wednesday, April 9] at all contingent on diplomatic and congressional consultations? Or was the military option, once chosen at mid-week, to go toward irrespective? * *?"

White House deputy press secretary Larry Speakes: "It was to go forward, because we sent General Walters on Saturday and Sunday and Monday to visit with the allies. They were told that the President had decided on the military option, and we'd go from there." (White House morning press briefing, April 15.)

APPENDIX 3

Transcript of Address by President Reagan on Libya, April 14, 1986

My fellow Americans, at 7 o'clock this evening Eastern time, air and naval forces of the United States launched a series of strikes against the headquarters, terrorist facilities and military assets that support Muammar Qaddafi's subversive activities.

The attacks were concentrated and carefully targeted to minimize casualties among the Libyan people, with whom we have no quarrel.

From initial reports, our forces have succeeded in their mission. Several weeks ago, in New Orleans, I warned Colonel Qaddafi we would hold his regime accountable for any new terrorist attacks launched against American citizens. More recently, I made it clear we would respond as soon as we determined conclusively who was responsible for such attacks.

On April 5 in West Berlin a terrorist bomb exploded in a nightclub frequented by American servicemen. Sgt. Kenneth Ford and a young Turkish woman were killed and 230 others were wounded, among them some 50 American military personnel.

This monstrous brutality is but the latest act in Colonel Qaddafi's reign of terror. The evidence is now conclusive that the terrorist bombing of La Belle discotheque was planned and executed under the director orders of the Libyan regime.

On March 25, more than a week before the attack, orders were sent from Tripoli to the Libyan People's Bureau in East Berlin to conduct a terrorist attack against Americans, to cause maximum and indiscriminate casualties. Libya's agents then planted the bomb.

On April 4, the People's Bureau alerted Tripoli that the attack would be carried out the following morning. The next day they reported back to Tripoli on the great success of their mission.

Our evidence is direct, it is precise, it is irrefutable. We have solid evidence about other attacks Qaddafi has planned against the United States' installations and diplomats and even American tourists.

Thanks to close cooperation with our friends, some of these have been prevented. With the help of French authorities, we recently aborted one such attack: a planned massacre using grenades and small arms of civilians waiting in lines for visas at an American Embassy.

Colonel Qaddafi is not only an enemy of the United States. His record of subversion and aggression against the neighboring states in Africa is well documented and well known. He has ordered the murder of fellow Libyans in countless countries. He has sanctioned acts of terror in Africa, Europe and the Middle East, as well as the Western Hemisphere. Today we have done what we had to do. If necessary, we shall do it again.

It gives me no pleasure to say that, and I wish it were otherwise. Before Qaddafi seized power in 1969, the people of Libya had been friends of the United States, and I'm sure that today most Libyans are ashamed and disgusted that this man has made their country a synonym for barbarism around the world.

The Libyan people are a decent people caught in the grip of a tyrant.

To our friends and allies in Europe who cooperated in today's mission, I would only say you have the primary gratitude of the American people. Europeans who remember history understand better than most that there is no security, no safety, in the appeasement of evil. It must be the core of Western policy that there be no sanctuary for terror, and to sustain such a policy, free men and free nations must unite and work together.

Sometimes it is said that by imposing sanctions against Colonel Qaddafi or by striking at his terrorist installations, we only magnify the man's importance — that the proper way to deal with him is to ignore him. I do not agree. Long before I came into this office, Colonel Qaddafi had engaged in acts of international terror — acts that put him outside the company of civilized men. For years, however, he suffered no economic, or political or military sanction, and the atrocities mounted in number, as did the innocent dead and wounded.

And for us to ignore, by inaction, the slaughter of American civilians and American soldiers, whether in nightclubs or airline terminals, is simply not in the American tradition. When our citizens are abused or attacked anywhere in the world, on the direct orders of a hostile regime, we will respond, so long as I'm in this Oval Office. Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight — a mission fully consistent with Article 51 of the United Nations Charter.

We believe that this pre-emptive action against his terrorist installations will not only diminish Colonel Qaddafi's capacity to export terror — it will provide him with incentives and reasons to alter his criminal behavior. I have no illusion that tonight's action will bring down the curtain on Qaddafi's reign of terror, but this mission, violent though it was, can bring closer a safer and more secure world for decent men and women. We will persevere.

This afternoon we consulted with the leaders of Congress regarding what we were about to do and why. Tonight, I salute the skill and professionalism of the men and women of our armed forces who carried out this mission. It's an honor to be your Commander in Chief.

We Americans are slow to anger. We always seek peaceful avenues before resorting to the use of force, and we did. We tried quiet diplomacy, public condemnation, economic sanctions and demonstrations of military force — none succeeded. Despite our repeated warnings, Qaddafi continued his reckless policy of intimidation, his relentless pursuit of terror.

He counted on America to be passive. He counted wrong. I warned that there should be no place on earth where terrorists can rest and train and practice their deadly skills. I meant it. I said that we would act with others if possible and alone if necessary to insure that terrorists have no sanctuary anywhere.

Tonight we have. Thank you, and God bless you.

APPENDIX 4

List of Members of Congress Invited to April 14, 1986, White House Briefing

The following Members of Congress were invited to a meeting at the White House on April 14, 1986 which began at 4:00 p.m. (EST).

SENATE

Robert Dole, Majority Leader
Robert C. Byrd, Minority Leader
Strom Thurmond, President pro tempore
Richard G. Lugar, Chairman, Foreign Relations Committee
Claiborne Pell, Ranking Minority Member, Foreign Relations Committee
Barry Goldwater, Chairman, Armed Services Committee*
Sam Nunn, Ranking Minority Member, Armed Services Committee

HOUSE

Thomas P. O'Neill, Jr., Speaker*
Jim Wright, Majority Leader*
Thomas S. Foley, Majority Whip*
Robert H. Michel, Minority Leader
Dante B. Fascell, Chairman, Foreign Affairs Committee
William S. Broomfield, Ranking Minority Member, Foreign Affairs Committee
Les Aspin, Chairman, Armed Services Committee
William L. Dickinson, Ranking Minority Member, Armed Services Committee

* Unable to attend but were personally briefed either by phone or by officials of the Executive branch.

APPENDIX 5

II

99TH CONGRESS
2D SESSION

S. J. RES. 340

To amend the War Powers Resolution to establish a permanent body for the purposes of consultation as required in section 3 under the resolution.

IN THE SENATE OF THE UNITED STATES

MAY 8 (legislative day, MAY 5), 1986

Mr. BYRD (for himself, Mr. CRANSTON, Mr. INOUYE, Mr. PELL, Mr. LEAHY, and Mr. EAGLETON) introduced the following joint resolution; which was read twice and referred to the Committee on Foreign Relations

---

JOINT RESOLUTION

To amend the War Powers Resolution to establish a permanent body for the purposes of consultation as required in section 3 under the resolution.

1 *Resolved by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled,*
3 That section 3 of the Public Law 93–148, also known as the
4 War Powers Resolution, is amended—
5 (1) by inserting "(a)" after "Sec. 3."; and
6 (2) by adding at the end thereof the following:
7 "(b) For purposes of consultation as required in subsec-
8 tion (a), there is established within the Congress a permanent
9 consultative body composed of—

1 "(A) the Speaker of the House of Representatives
2 and the President pro tempore of the Senate;
3 "(B) the Majority Leader and the Minority Leader
4 of the House of Representatives and the Majority
5 Leader and the Minority Leader of the Senate;
6 "(C) the chairman and ranking minority member
7 of each of the following committees of the House of
8 Representatives:
9 "(i) the Committee on Foreign Affairs;
10 "(ii) the Committee on Armed Services; and
11 "(iii) the Permanent Select Committee on In-
12 telligence; and
13 "(D) the chairman and ranking minority member
14 of each of the following committees of the Senate:
15 "(i) the Committee on Foreign Relations;
16 "(ii) the Committee on Armed Services; and
17 "(iii) the Select Committee on Intelligence.".

APPENDIX 6

I

99TH CONGRESS
2D SESSION

H. R. 4611

To protect United States citizens from terrorism.

IN THE HOUSE OF REPRESENTATIVES

APRIL 17, 1986

Mr. BARTON of Texas (for himself, Mr. HUNTER, and Mr. LIVINGSTON) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Foreign Affairs

---

A BILL

To protect United States citizens from terrorism.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**
4 This Act may be cited as the "Anti-Terrorism Act of
5 1986".
6 **SEC. 2. FINDINGS AND PURPOSES.**
7 (a) FINDINGS.—The Congress finds and declares that
8 terrorism is—
9 (1) a form of aggression which results in the kill-
10 ing of innocent persons, the loss of civil liberties

1 through intimidation and coercion, or the loss of prop-
2 erty;
3 (2) a form of aggression that has as its goal the
4 furtherance of a political or ideological objective by
5 violent means;
6 (3) directed against the orderly and democratic
7 conduct and security of all people;
8 (4) a threat to the national security and national
9 interests of the United States;
10 (5) a threat to the safety of all United States per-
11 sons; and
12 (6) a threat to the continued and effective oper-
13 ation of the Government of the United States.
14 (b) PURPOSES.—It is the purpose of this Act—
15 (1) to protect United States persons from terror-
16 ism; and
17 (2) to grant the President under appropriate cir-
18 cumstances the authority to punish terrorists or terror-
19 ist organizations for acts committed against United
20 States persons.
21 **SEC. 3. DEFINITIONS.**
22 For purposes of this Act—
23 (1) the term "terrorism" means activity, directed
24 against United States persons, which—

1 (A) is committed by an individual who is not
2 a national or permanent resident alien of the
3 United States;
4 (B) involves violent acts or acts dangerous to
5 human life which would be a criminal violation if
6 committed within the jurisdiction of the United
7 States; and
8 (C) is intended—
9 (i) to intimidate or coerce a civilian pop-
10 ulation;
11 (ii) to influence the policy of a govern-
12 ment by intimidation or coercion; or
13 (iii) to affect the conduct of a govern-
14 ment by assassination or kidnapping;
15 (2) the terms "terrorist" and "terrorist organiza-
16 tion" mean an individual, group, or any combination
17 thereof which are involved in an act of terrorism;
18 (3) the term "national of the United States"
19 means—
20 (A) a natural person who is a citizen of the
21 United States or a natural person (other than an
22 alien) who, though not a citizen of the United
23 States, owes permanent allegiance to the United
24 States; or

1 (B) a corporation or other entity which is or-
2 ganized under the laws of the United States, if
3 natural persons (described in subparagraph (A))
4 own, directly or indirectly, more than 50 percent
5 of the outstanding capital stock or other beneficial
6 interest in such legal entity;
7 (4) the term "United States" means the several
8 States, the District of Columbia, the Commonwealth of
9 Puerto Rico, the Commonwealth of the Northern Mari-
10 ana Islands, the Virgin Islands, Guam, American
11 Samoa, and any other territory or possession of the
12 United States; and
13 (5) the term "United States person" means any
14 individual, organization, corporation, or entity which is
15 either a permanent resident alien or national of the
16 United States or subject to its domestic jurisdiction.
17 **SEC. 4. OFFENSE OF TERRORISM.**
18 (a) OFFENSE.—Notwithstanding any other provision of
19 law, whoever organizes, attempts, commits, procures, or sup-
20 ports the commission of an act of terrorism shall be consid-
21 ered to have committed an act of aggression against the
22 United States and may be pursued with deadly force.
23 (b) AUTHORIZATION OF PRESIDENTIAL ACTION.—
24 Notwithstanding any other provision of law and except as
25 provided in subsection (d), the President is authorized to un-

1 dertake actions to protect United States persons against
2 terrorists and terrorist activity through the use of all such
3 antiterrorism and counterterrorism measures as he deems
4 necessary.

5 (c) DURATION OF AUTHORITY.—Notwithstanding any
6 other provision of law, subsection (b) shall apply—

7 (1) to all terrorists wherever they may be; and

8 (2) until such time as the President determines
9 that no terrorist poses a threat to United States
10 persons.

11 (d) CONSTITUTIONAL LIMITATION.—The authority
12 granted to the President under this Act may be exercised in
13 the United States only in accordance with the provisions of
14 the United States Constitution.

15 (e) INTERPRETATION.—Nothing in this Act may be
16 construed as granting any authority to use deadly force
17 within the United States which authority would not exist in
18 the absence of this Act.

19 **SEC. 5. REPORT.**

20 The President shall submit a report to the Congress not
21 later than 10 days after the President takes any action under
22 section 4(b). The report shall describe in detail the terrorist
23 threat or terrorist act which justified such action.

APPENDIX 7

Anti-Terrorism Act of 1986 (S. 2335 and H.R. 4611); a Summary Prepared by Ellen C. Collier, Specialist in U.S. Foreign Policy, Foreign Affairs and National Defense Division, Congressional Research Service, Library of Congress

On April 17, 1986, Senators Robert Dole and Jeremiah Denton and Representatives Joe Barton, Duncan Hunter, and Bob Livingston introduced the Anti-Terrorism Act of 1986 (S. 2335 and H.R. 4611) to strengthen the President's hand in dealing with terrorist threats. 1/ The bill raises several policy questions of importance to Congress:

--Should Congress grant the President additional explicit authority to combat terrorism?

--What effect will the bill have on existing congressional restrictions or limitations on the use of military force (i.e. the War Powers Resolution) and covert actions?

--Does the bill loosen congressionally supported bans against U.S. personnel engaging in assassination?

--How broadly should terrorist activity be defined?

--Is the use of military action and covert force the best method to combat terrorism?

(1) Congressional authorization for President to use military force against terrorism

Section 4(b) of the bill authorizes the President to use all measures he deems necessary to protect U.S. persons against terrorist actions. Senator Dole contends on the one hand that this section does not give the President any new authority because the President's role as Commander-in-Chief and his authority to defend the United States already endow him with independent power to respond to terrorists. But he adds that since there is disagreement in the United States and misunderstanding abroad about the President's power, the bill would make clear, especially to terrorists, that the President does have the power and flexibility to

1/ Copy of bill is attached.

act quickly and that Congress supports him. In contrast, opponents argue that the bill would give the President a "blank check" to authorize in advance preemptive as well as punitive strikes against terrorists or governments supporting terrorists.

(2) Effect on the War Powers Resolution

The bill does not amend the War Powers Resolution (P.L. 93-148) but would supercede it in key aspects where terrorism is involved. Three restraints in the War Powers Resolution would be affected: the consultation requirement, the reporting requirement, and the durational limits on actions.

Consultation: The bill authorizes action notwithstanding any other provision of law and does not require consultation with Congress. Section 3 of the War Powers Resolution requires the President to consult with Congress in every possible instance before introducing U.S. armed forces into hostilities or situations where imminent hostilities are clearly indicated by the circumstances. Supporters of the bill believe that prior consultation, as required in the War Powers Resolution, could jeopardize the secrecy and speed necessary for successful actions to combat terrorism, but consultation could still occur when feasible. In their view, the War Powers Resolution was written before terrorism became a major threat, so new rules are necessary.

Some opponents contend that the consultation requirements of the War Powers Resolution have not hindered Presidents thus far (and indeed have not been adequately observed.) In their view, the consultation provisions should not be bypassed but strengthened, either formally or informally, by such methods as designating Members of Congress to be consulted. They believe consultation is one way for Congress to participate in making decisions

involving the use of the armed forces that might get the United States into war.

Reporting requirement: The anti-terrorism bill requires the President to report to Congress on an action under section 4(b) not later than 10 days afterwards, rather than in 48 hours as in the War Powers Resolution. The nature of the report required under the proposed legislation also differs to some degree from that required under the War Powers Resolution. The new measure would require the President to provide a detailed description of the terrorist threat or act justifying the action taken, while the War Powers Resolution requires the President to describe the estimated scope and duration of hostilities or involvement and his legislative and constitutional authority for acting, as well as the circumstances necessitating introduction of U.S. forces. As the anti-terrorism bill, itself, would provide a basis for presidential action, some parts of the reporting requirement of the War Powers Resolution may have been deemed unnecessary by its drafters.

Supporters of the bill state that it would provide for a more comprehensive and useful report. Opponents contend that the more immediate report required by the War Powers Resolution could prompt Congress to act more quickly if it opposed the President's action, and that a report under the War Powers Resolution was important because it could trigger the time limit of 60-90 days.

Duration: The proposed Anti-Terrorist Act has no durational limit. Section 4(c) provides that, notwithstanding any other provision of law, the President's authorization would apply until such time as the President determined that no terrorist posed a threat to U.S. persons. The War Powers Resolution requires the President to terminate the use of

U.S. Armed Forces introduced into hostilities or situations of imminent hostilities, and required to be reported, within 60 days (possibly extended to 90 days) unless Congress specifically authorizes further use or declares war. Although they believe anti-terrorist activities would usually be of short duration, supporters say the bill would remove an arbitrary time limit and provide the President flexibility to do what is necessary. Opponents contend it would remove a valuable restraint added after the Vietnam War to prevent the United States from becoming involved in a long undeclared war without the clear and specific authorization of Congress.

(3) Effect on oversight of covert activities

The bill could also supercede provisions in the Intelligence Oversight Act of 1980 (P.L. 96-450) concerning oversight of covert activities. Under this act, absent extraordinary circumstances, a Presidential finding that a covert action is necessary must be sent prior to the initiation of the action to the House and Senate Intelligence Committees. The prior notice may be limited to specified leaders in extraordinary circumstances and the President may forego prior notice but he must report it in a timely fashion and provide his reasons for not giving prior notice. The anti-terrorism bill does not require prior notice and authorizes action notwithstanding any other provision of law except as provided in subsection 4(d) which states that the authority granted may be used in the United States only in accordance with the Constitution.

Arguments in favor of permitting action without prior notice would be to permit greater secrecy and flexibility for Presidential action. Arguments against would include that the report required after ten days by the anti-terrorism bill would be an inadequate congressional check and provide for no congressional advice prior to such actions.

(4) Effect on ban against assassination

An executive order prohibits any person employed by or acting on behalf of the United States to engage in or conspire in assassination. (Executive order 12333, December 11, 1981.) Such a ban was adopted by the Ford Administration after various congressional investigations of intelligence activities and has been endorsed by each succeeding President. One sponsor of S. 2335 has said the bill raises interesting questions about this rule, and that he would interpret the bill to mean that had Col. Qadaffi died as a result of the April 14, 1986, airstrike against Libya, this would have been within the scope of the bill. Another supporter has said that a case could be made for assassination but it would have to meet the requirements of the law. Opponents of the bill contend assassination is tantamount to murder and the United States should not engage in it or appear to give permission for it in legislation.

(5) Definition of terrorism

The bill provides a broad definition of terrorism. Terrorists are said to include not only those who commit the terrorist acts but those who organize, lead, fund, or support terrorists. Terrorist acts are defined as violent acts directed against U.S. persons, which would be a criminal violation if committed within U.S. jurisdiction, and which are intended to intimidate a civilian population or influence U.S. policy through coercion. Proponents point out this definition includes leaders of any state which supports terrorism, thus allowing the United States to act against the "source" of terrorism. Opponents view the definition as too broad. In their view it would allow the use of unlimited U.S. force in any foreign country, friendly or adversarial, against foreign persons

who have planned, but not necessarily committed, an act of terrorism against a U.S. person. The U.S. person could be a foreign-based company if 50 percent of its stock is owned, even indirectly, by U.S. persons. Moreover, it leaves entirely to the President to weigh the evidence and determine who should be held responsible for the terrorist activities.

In another sense, critics argue, the bill defines terrorists narrowly by excluding U.S. terrorists from its provisions. Section 3(1)(a) defines terrorism to mean an activity against a U.S. person committed by an individual who is not a national or permanent resident alien of the United States. Section 4(e) adds that nothing in the act may be construed to grant any authority to use deadly force within the United States which would not exist in the absence of the act. Proponents say these measures make the bill apply only to acts by foreigners and to have no impact on the rights of Americans. Opponents question whether it means any terrorist activity abroad committed or aided by a U.S. citizen would be immune from the law.

(6) Use of military force against foreign terrorists

The bill also raises the broad question of whether military force is the best way to combat terrorism. Granting the President an explicit source of authority to use whatever means he deems necessary against terrorists would facilitate and possibly encourage the use of military force. Some regard terrorism as a form of war that can be halted only by military force directed at the source of the terrorist support. Others contend that military actions would jeopardize U.S. relations with other countries, violate international law, and result in further retaliatory terrorist activities. In their view terrorism can better be coped with by improved intelligence and security, increased international cooperation, diplomacy, and other traditional methods.

ANTI-TERRORISM ACT OF 1986
(S. 2335 and H.R. 4611*)

S. 2335

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Anti-Terrorism Act of 1986".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.— The Congress finds and declares that terrorism is—

(1) a form of aggression which results in the killing of innocent persons, the loss of civil liberties through intimidation and coercion, or the loss of property;

(2) a form of aggression that has as its goal the furtherance of a political or ideological objective by violent means;

(3) directed against the orderly and democratic conduct and security of all people;

(4) a threat to the national security and national interests of the United States;

(5) a threat to the safety of all United States persons; and

(6) a threat to the continued and effective operation of the Government of the United States.

(b) PURPOSES.—It is the purpose of this Act—

(1) to protect United States persons from terrorism; and

(2) to grant the President under appropriate circumstances the authority to punish terrorists or terrorist organizations for acts committed against United States persons.

SEC. 3. DEFINITIONS.

For purposes of this Act—

(1) the term "terrorism" means activity, directed against United States persons, which—

(A) is committed by an individual who is not a national or permanent resident alien of the United States;

(B) involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(C) is intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnaping;

(2) the terms "terrorist" and "terrorist organization" mean an individual, group, or any combination thereof which are involved in an act of terrorism;

(3) the term "national of the United States" means—

(A) a natural person who is a citizen of the United States or a natural person (other than an alien) who, though not a citizen of the United States, owes permanent allegiance to the United States; or

(B) a corporation or other entity which is organized under the laws of the United States, if natural persons (described in subparagraph (A)) own, directly or indirectly, more than 50 percent of the outstanding capital stock or other beneficial interest in such legal entity;

(4) the term "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States; and

(5) the term "United States person" means any individual, organization, corporation, or entity which is either a permanent resident alien or national of the United States or subject to its domestic jurisdiction.

SEC. 4. OFFENSE OF TERRORISM.

(a) OFFENSE.—Notwithstanding any other provision of law, whoever organizes, attempts, commits, procures, or supports the commission of an act of terrorism shall be considered to have committed an act of aggression against the United States and may be pursued with deadly force.

(b) AUTHORIZATION OF PRESIDENTIAL ACTION.—Notwithstanding any other provision of law and except as provided in subsection (d), the President is authorized to undertake actions to protect United States persons against terrorists and terrorist activity through the use of all such anti-terrorism and counter-terrorism measures as he deems necessary.

(c) DURATION OF AUTHORITY.—Notwithstanding any other provisino of law, subsection (b) shall apply—

(1) to all terrorists wherever they may be; and

(2) until such time as the President determines that no terrorist poses a threat to United States persons.

(d) CONSTITUTIONAL LIMITATION.—The authority granted to the President under this Act may be exercised in the United States only in accordance with the provisions of the United States Constitution.

(e) INTERPRETATION.—Nothing in this Act may be construed as granting any authority to use deadly force within the United States which authority would not exist in the absence of this Act.

SEC. 5. REPORT.

The President shall submit a report to the Congress not later than 10 days after the President takes any action under section 4(b). The report shall describe in detail the terrorist threat or terrorist act which justified such action.

FACT SHEET ON TERRORISM BILL

ELEMENTS OF THE BILL

Defines terrorism as an act of aggression by a foreigner, aimed at U.S. citizens and corporations, with the purpose of influencing our policy.

Gives the President clear-cut authority to deal with specific acts of terrorism with all appropriate means, including deadly force.

Gives the President authority to act to preempt as well as respond to specific acts of terrorism.

Makes clear terrorists include not only actual "bomb throwers" but also those who organize, lead, fund and support terrorists.

Requires the President to report to Congress within ten days of utilizing his authority, specifying in detail the terrorist threat or terrorist act that justified his action.

Supercedes the War Powers Resolution by: (1) imposing no time limit, such as the 60 and 90 day time limits in the resolution, on the President's use of force in a terrorist situation; (2) requiring no prior consultation with Congress; (3) and extending the reporting period from 48 hours to 10 days.

PROTECTIONS IN THE BILL

Limits the authority to terrorist situations.

Insures, through the reporting requirement, that the authority will be used only to combat specific acts of terror.

Does not expand the President's traditional powers to conduct foreign policy—only to react to terrorism.

Applies only to acts by foreigners and has no impact on the rights of Americans.

---

*Source: Remarks of Senator Robert Dole, Congressional Record, daily edition, April 17, 1986, p. S 4425

S. 2335 was introduced on April 17, 1986, by Senators Robert Dole and Jeremiah Denton and referred to the Foreign Relations Committee. H.R. 4611 was introduced the same day by Representatives Joe Barton, Duncan Hunter, and Bob Livingston and referred jointly to the Judiciary and Foreign Affairs Committees.

APPENDIX 8

Questions Submitted by Chairman Fascell to Abraham D. Sofaer (Responses not Received)

1. *It is now clear from the evidence available that the U.S. decision to conduct exercises in the Gulf of Sidra on March 24 and the bombing raid on Libya on April 14 were part of a larger U.S. policy designed to combat— with force if necessary — Libya's support for terrorism. Libya was accused of armed aggression by the U.S. President on January 7, when economic sanctions were imposed. administration officials had repeatedly stressed that the U.S. would make Libya "pay a high price for its actions." These officials were quoted in press accounts as seeing the maneuvers as "part of a war of nerves" and "satisfying the administration's goal of sending a message of U.S. resolve to Qaddafi." Finally, the concentration of warships for its naval maneuvers was much greater than previous exercises in anticipation of a Libyan effort to attack U.S. forces.*

   a) *Given this carefully-crafted policy and the events over many months, how can there be any question that the conduct of naval maneuvers in the Gulf of Sidra involved introducing troops into a situation of imminent involvement in hostilities, thereby requiring prior consultation and ex post facto reporting under the War Powers Resolution?*

   b) *Since fleet maneuvers and maintaining "freedom of navigation" in the Gulf of Sidra involved neither time nor secrecy considerations, why wasn't Congress consulted in advance as required by the War Powers Resolution?*

2. *In a Washington Post article of March 30 Mr. Atwood asserted that the State Department, in its legal consideration regarding War Powers Resolution applicability to the Gulf of Sidra exercises in 1981, purposely developed scenarios and changed rules of engagement to avoid effective recognition that hostilities or imminent involvement in hostilities were clearly indicated by the circumstances.*

a) *Would you care to comment on these assertions regarding a similar action five years ago and whether similar efforts were exercised by administration lawyers regarding the March 24 Gulf of Sidra situation?*

b) *How does the State Department take rules of engagement and changes in them into consideration when it considers if the War Powers Resolution is applicable?*

c) *Didn't the Libyan attack on U.S. naval forces in the Gulf of Sidra maneuvers in 1981, when two Libyan aircraft attacked U.S. forces, clearly indicate that hostilities were likely in the most recent maneuvers? If not, why was the size of the forces used in the maneuvers increased from a two carrier to a three carrier force?*

3. I wrote to the President in a March 24 letter asking for consultations with Congress under section 3 of the War Powers Resolution regarding the Gulf of Sidra exercises. The administration response of March 26 states "our maneuvers in the Gulf have long been planned, as part of a global freedom-of-navigation program." It goes on to say that after Libya "attacked our forces, we notified congressional leaders." It seems to me this letter is establishing a dangerous precedent.

The first thing the President does is to claim the right to enter hostilities or imminent involvement in hostilities on legitimate but actually contrived pretexts. He uses the superficial legitimacy to avoid consultation under the War Powers Resolution. As a final step in this scenario, the President avoids reporting under the Resolution by claiming that subsequent hostilities arose out of the original alleged legitimate pretext.

a) Is the administration attempting to undermine the War Powers Resolution through this precedent?

b) Would you argue that there is anything in the War Powers Resolution that exempts involvement in imminent hostilities simply because they occur in international waters or airspace?

4. The President's March 26 letter to Congress on the Gulf of Sidra was somewhat curious. It went to the Speaker and the Senate President pro tempore, the designated recipients of War Powers Reports. Other reporting requirements of section 4 of the War Powers Resolution were also present in the letter, including the circumstances necessitating the introduction of U.S. Armed Forces, the constitutional and legislative authority under which the introduction took place, and the estimated scope and duration of the hostilities or involvement. In short, the report walked and talked like a war powers report without citing the Resolution.

a) Was this report a grudging, indirect admission by the administration that the War Powers Resoultion was applicable to the events in the Gulf of Sidra?

b) If not, why was this format chosen, since it seems to depart from the fictional public posture regarding the purpose of the maneuvers?

5. *Supreme Court Justice Jackson observed in the* <u>*Steel Seizure*</u> *case that "no penance would ever expiate the sin against free government of holding that a President can escape control of executive power by law through assuming his military role."*

a) *What authority permits the President to raise himself above the law by disregarding a clearcut legal requirement as in the case of consultation and reporting under sections 3 and 4 of the War Powers Resolution?*

b) *Why does the administration refuse to take those steps that ensure that Congress will be fully consulted at the outset of an involvement like the Gulf of Sidra maneuvers that could have led to war when it knows that the Congress has the preeminent authority under the Constitution?*

6. *What does consultation between the Executive branch and the Congress mean to you?*

- *Does it mean supplying information?*
- *Does it mean notifying the Congress about decisions already approved?*
- *Does it mean notifying the Congress about decisions already taken?*
- *Does it mean trying to enlist the support for a Presidential decision?*
- *Does it mean discussion of options collectively in the early stages of policy formation and before a final policy is adopted?*

7. *State-sponsored terrorism represents a new kind of warfare. President Reagan emphasized that responding to this type of terrorism may require* <u>*repeated*</u> *commitments of military force. Maintaining confidentiality concerning military action against terrorism will also be crucial to an effective counter-terrorist strategy.*

a) *Can you cite any case where leaks from the Congress adversely affected activities that come under the consultation-reporting umbrella of the War Powers Resolution?*

b) *If so, how have those activities been adversely affected?*

8. *In formulating his counter-terrorist strategy, President Reagan appears to be enunciating a policy based on a concept of self-defense which calls for retaliation to terrorist attacks at any time or place. He also observed with respect to Libya's activities that "by providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if it had used its own armed forces."*

a) *Under the President's enunciated policy are we in a de facto state of war against Libya as a result of their equivalent of armed aggression against the United States?*

b) *Is a clarification of war or other authorization of force from the Congress against Libya needed to implement this concept of self-defense?*

9. *Under international law, the customary definition of self-defense under international law includes a notion that force used in self-defense must be proportionate to the threat and cannot exceed measures strictly necessary for self-defense.*

a) *Does the administration subscribe to this customary definition?*

b) *Would an invasion of Libya or some other state sponsoring terrorism be a proportionate response to terrorist acts under the President's use of self-defense against terrorism?*

c) *How, in your view, do the terms of the War Powers Resolution affect the use of self-defense against terrorism?*

10. *Responding to terrorism is but one of many U.S. foreign policy objectives. The administration seems to be moving toward an anti-terrorist strategy similar to Israel. However, the U.S. is a superpower with concerns about world order, upholding the territorial integrity of states, relationships with European allies and moderate Arab states, Soviet attitudes toward U.S. actions, and other foreign policy objectives.*

a) *Given the complexity of foreign policy objectives that are affected by a counter-terrorist strategy, doesn't this underscore and demonstrate the need for prior consultation with Congressional leaders before force is used as required by section 3 of the War Powers Resolution?*

b) *Doesn't this complexity further indicate that the Congress, as the representative of the American people, ultimately approve the long-term use of force if a counter-terrorism strategy is to be successful?*

11. *The nature of consultation under section 3 of the War Powers Resolution has always been somewhat unclear. The problem of who to consult with in a timely manner and how to preserve the element of secrecy often critical to the success of a commitment of force have often been cited by Presidents as reasons for limiting consultation. Congress, in turn, has complained that the President seldom if ever seeks genuine consultation with the Congress and merely notifies them without giving experienced Members of Congress any input into the decision to enter conflict.*

To attempt to improve consultation, particularly in instances where uses of force may be repeated, a number of individuals, including four Democratic senators led by Minority Leader Byrd, have proposed the establishment of a Congressional Leadership Committee made up of the House and Senate leaders and the foreign policy committees of the Congress that would receive some type of formal designation as the group of Congressional leaders that would be the locus for consultation when section 3 of the War Powers Resolution was operative.

a) *What is your reaction to this proposal and would it represent an improvement over existing consultative procedures?*

b) *What types of authority, access to information, and organization should be incorporated to make such a Committee successful?*

c) *Given Congress' undeniable constitutional responsibilities concerning the use of force, and the fact that senior leaders of Congress generally have far more foreign policy experience than the President and his cabinet, would such a Committee provide a vitally-needed independent voice on the decision to use force and how to use it?*

d) *Would not such a collective judgment make U.S. use of force more effective in achieving a primary U.S. foreign policy objective like combating state-sponsored terrorism? A genuinely united U.S. government action is the best offense against state-sponsored terrorism. Do you agree?*

APPENDIX 9

Questions Submitted for the Record by Chairman Fascell to Archibald Cox and Responses Thereto

1. In his testimony before our subcommittee on Tuesday, Judge Sofaer alleged that the War Powers Resolution does not apply to the deployment of specially-trained anti-terrorist units, where operations of a traditional military character are not contemplated and and where no confrontation is expected between these units and forces of another state.

A number of members, both Republican and Democrat, pointed out that the provisions of the War Powers Resolution are triggered by the involvement or imminent involvement of troops in hostilities. The definition of hostilities does not exclude specially-trained anti-terrorist units or terrorist organizations not a part of a state's armed forces.

a) Do you interpret anything in the terms of the War Powers Resolution that would distinguish between hostilities with forces of a state and with forces of a terrorist organization?

1(a): The terms of the War Powers Resolution clearly apply to any hostilities between armed forces of the United States and the forces of any foreign government, whether de jure or de facto. The Resolution seems inapplicable to the use of force to deal with a small number of terrorists where there is no risk of encounter with the armed forces of a de jure or de facto government. The terms of the Resolution and the circumstances of its adoption leave it somewhat uncertain whether the forces of a terrorist organization may achieve such size and power as to bring the War Powers Act into play even though no hostilities with the forces of a de jure or de facto government are involved.

b) Can it be reasonabily argued that anti-terrorist units are not "equipped for combat" under the terms of the War Powers Resolution?

(b): My knowledge about the equipment of our anti-terrorist units is insufficient for me to say that all of them are always equipped for combat under the terms of the War Powers Act. The planes that bombed Libya plainly were "equipped for combat."

c) How can the Administration argue that these anti-terrorist units should be treated under international conventions as prisoners of war and then claim they are not equipped for combat or introduced into hostilities?

(c): The Administration argument seems illogical.

2. It is now clear from the evidence available that the U.S. decision to conduct exercises in the Gulf of Sidra on March 24 and the bombing raid on Libya on April 14 were part of a larger U.S. policy designed to combat— with force if necessary — Libya's support for terrorism. Libya was accused of armed aggression by the U.S. President on January 7, when economic sanctions were imposed. administration officials had repeatedly stressed that the U.S. would make Libya "pay a high price for its actions." These officials were quoted in press accounts as seeing the maneuvers as "part of a war of nerves" and "satisfying the administration's goal of sending a message of U.S. resolve to Qaddafi." Finally, the concentration of warships for its naval maneuvers was much greater than previous exercises in anticipation of a Libyan effort to attack U.S. forces.

a) Given this carefully-crafted policy and the events over many months, do you concur that the conduct of naval maneuvers in the Gulf of Sidra involved introducing troops into a situation of imminent involvement in hostilities, thereby requiring prior consultation and ex post facto reporting under the War Powers Resolution?

2(a): The conduct of naval maneuvers in the Gulf of Sidra may well have involved introducing troops into a situation of imminent involvement in hostilities, thereby requiring prior Consultation and ex post facto reporting under the War Powers Resolution. Whether it did or not depends on an estimate of the likelihood of Libyan fire. I lack the knowledge to offer an estimate except to observe that the deliberately provocative nature of the naval maneuver increased the risk of imminent involvement in hostilities. The violation of the War Powers Resolution is not as patent as in the case of the subsequent bombing of Tripoli and Bengazi.

b) Since fleet maneuvers and maintaining "freedom of navigation" in the Gulf of Sidra involved neither time nor secrecy considerations, should Congress have been consulted in advance as required by the War Powers Resolution?

(b): The President would have been wise to consult the Congress before the fleet maneuvers.

3. Chairman Fascell wrote to the President in a March 24 letter asking for consultations with Congress under section 3 of the War Powers Resolution regarding the Gulf of Sidra exercises. The administration response of March 26 states "our maneuvers in the Gulf have long been planned, as part of a global freedom-of-navigation program." It goes on to say that after Libya "attacked our forces, we notified congressional leaders." It seems to me this letter is establishing a dangerous precedent.

The first thing the President does is to claim the right to enter hostilities or imminent involvement in hostilities on legitimate but actually contrived pretexts. He uses the superficial legitimacy to avoid consultation under the War Powers Resolution. As a final step in this scenario, the President avoids reporting under the Resolution by claiming that subsequent hostilities arose out of the original alleged legitimate pretext.

a) Based on your review of the War Powers Act, is there anything in it that exempts involvement in imminent hostilities simply because they occur in international waters or airspace?

3(a): No.

4. What does consultation between the Executive branch and the Congress mean to you?

- Does it mean supplying information?
- Does it mean notifying the Congress about decisions already approved ?
- Does it mean notifying the Congress about decisions already taken?
- Does it mean trying to enlist the support for a Presidential decision?
- Does it mean discussion of options collectively in the early stages of policy formation and before a final policy is adopted?

4: The meaning of "consultation" in Section 3 of the War Powers Resolution is authoritatively stated in H. Rep. #93-287, p. 6, which accompanied the House version of the legislation enacted in 1973:

> A considerable amount of attention was given to the definition of consultation. Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action being contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.

1. In formulating his counter-terrorist strategy, President Reagan appears to be enunciating a policy based on a concept of self-defense which calls for retaliation to terrorist attacks at any time or place. He also observed with respect to Libya's activities that "by providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if it had used its own armed forces."

a) Under the President's enunciated policy are we in a de facto state of war against Libya as a result of their equivalent of armed aggression against the United States?

1(a): Neither the facts nor the President's pronouncement that he was engaged in defending the United States bring the bombing of Libya within the constitutional principle allowing the President, without action by Congress, to defend the United States against an armed attack. The President is distorting the meaning of "defend" by using it to cover reprisals and pre-emptive attacks upon a foreign power.

b) Is a clarification of war or other authorization of force from the Congress against Libya needed to implement this concept of self-defense?

(b): Action of the character taken by the President in bombing Libya requires at a minimum prior consultation in compliance with Section 3 of the War Powers Act and, if continued, probably requires a Declaration of War or other authorization by a Joint Resolution of Congress.

2. Under international law, the customary definition of self-defense under international law includes a notion that force used in self-defense must be proportionate to the threat and cannot exceed measures strictly necessary for self-defense.

a) From the viewpoint of international law, would an invasion of Libya or some other state sponsoring terrorism be a proportionate response to terrorist acts under the President's use of self-defense against terrorism?

2(a): No.

b) How, in your view, do the terms of the War Powers Resolution affect the use of self-defense against terrorism?

(b): The War Powers Resolution governs any use of the armed forces to do more than directly repel immediate acts of terrorists or promptly capture terrorists without encounter with the armed forces of a de jure of de facto government. It distorts the natural and proper meaning of the words to speak of pre-emptive strikes or punitive action against a foreign State as "self-defense."

3. Responding to terrorism is but one of many U.S. foreign policy objectives. The administration seems to be moving toward an anti-terrorist strategy similar to Israel. However, the U.S. is a superpower with concerns about world order, upholding the territorial integrity of states, relationships with European allies and moderate Arab states, Soviet attitudes toward U.S. actions, and other foreign policy objectives.

a) Given the complexity of foreign policy objectives that are affected by a counter-terrorist strategy, doesn't this underscore and demonstrate the need for prior consultation with Congressional leaders before force is used as required by section 3 of the War Powers Resolution?

3(a): Yes.

b) Doesn't this complexity further indicate that the Congress, as the representative of the American people, ultimately approve the long-term use of force if a counter-terrorism strategy is to be successful?

(b): Yes.

4. The nature of consultation under section 3 of the War Powers Resolution has always been somewhat unclear. The problem of who to consult with in a timely manner and how to preserve the element of secrecy often critical to the success of a commitment of force have often been cited by Presidents as alleged reasons for limiting consultation. Congress, in turn, has complained that the President seldom if ever seeks genuine consultation with the Congress and merely notifies them without giving experienced Members of Congress any input into the decision to enter conflict.

To attempt to improve consultation, particularly in instances where uses of force may be repeated, a number of individuals, including four Democratic senators led by Minority Leader Byrd, have proposed the establishment of a Congressional Leadership Committee made up of the House and Senate leaders and the foreign policy committees of the Congress that would receive some type of formal designation as the group of Congressional leaders that would be the locus for consultation when section 3 of the War Powers Resolution was operative. Mr. Atwood's testimony on Tuesday outlined some of the specifics of this proposal.

a) What is your reaction to this proposal and would it represent an improvement over existing consultative procedures?

4(a): Adoption of the proposal would greatly strengthen and improve the War Powers Resolution. The essence of the proposal could be accomplished by amending Section 3 to substitute the phrase "with representative leaders in Congress" for the present phrase "with Congress." The Committee Report should note that the phrase "with representative leaders in Congress" is meant to include members not only of the joint leadership, but also members from the most relevant Committees.

I am somewhat less certain that a formal committee with prescribed membership should be established. Perhaps it would be preferable to leave the practical implementation of the general words that I have suggested to consultation between congressional leaders and representatives of the Executive Branch acting on behalf of the President. A less formal structure could be modified from time to time according to the lessons of experience.

Either of the revisions would improve the War Powers Resolution.

b) What types of authority, access to information, and organization should be incorporated to make such a Committee successful?

(b): See my answer to (a). All the information necessary for genuine participation in the process of decision making should be made available upon a serious congressional commitment to observe secrecy. The process would be greatly strengthened if in addition to establishing a formal requirement for consultation with representative leaders in Congress, provision were also made for regular periodic but more informal contacts between the Executive and one or two designated representatives of the congressional leaders, so they would be briefed about any developing confrontations before they became dangerous.

c) Given Congress' undeniable constitutional responsibilities concerning the use of force, and the fact that senior leaders of Congress generally have far more foreign policy experience than the President and his cabinet, would such a Committee provide a vitally-needed independent voice on the decision to use force and how to use it?

(c): Consultations with senior leaders of Congress would provide a vitally-needed independent voice.

APPENDIX 10

Naval Exercises in the Gulf of Sidra and the War Powers Resolution: a Summary Prepared by Raymond J. Celada, Senior Specialist in American Public Law, American Law Division, Congressional Research Service, Library of Congress

Among other things, the recent confrontation between elements of the U.S. Mediterranean Fleet and Libyan missiles and naval forces raises questions concerning compliance with the consultation and reporting requirements of the War Powers Resolution (WPR), 50 U.S.C. §§ 1541-1548. The latter, unquestionably the culmination of various efforts by Congress to reassert itself in reaction to Vietnam and the "excesses" of Watergate, was intended to preclude the nation being drawn into protracted hostilities without any meaningful congressional say. According to the law, Congress is to be consulted before the introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is already indicated by the circumstances. 50 U.S.C. § 1542. In the absence of a declaration of war, a report must be made to the Congress within 48 hours of any time when the United States Armed Forces are introduced into or likely to become involved in hostilities. 50 U.S.C, § 1543. Finally, the WPR requires that 60 days after a report is submitted or is required to be submitted, the President shall terminate any use of the United States Armed Forces unless Congress declares war, enacts a specific authorization for such use of the United States Armed Forces, or extends the 60-day period for 30 additional days. 50 U.S.C. § 1544.

As these procedures were not unequivocally followed in connection with the conflict in the Gulf of Sidra, some persons have complained that the President has broken the law. In their view, the conduct of maneuvers in this sensitive region of the Mediterranean triggered the consultation and reporting requirements because they were undertaken to provoke

hostilities or because in the Libyan context they posed the distinct possibility of hostilities.

An administration spokesman rejected the need to comply with the law in the case of naval maneuvers in international waters or airspace. Furthermore, it was asserted that notice to Congress was effectively given in a letter from President Reagan to House Speaker Thomas P. O'Neill Jr. and Senate President Pro Tempore Strom Thurmond, although the letter did not refer to the law. Finally, it was contended that the law's consultation provision is not triggered simply because hostilities are a possibility but only in the event that imminent hostilities are likely.

Persons who have followed developments in this area since passage in 1973 over presidential veto of the WPR are to be forgiven if these contrasting views cause them to observe that "there they go again". Or as expressed by Federal District Judge Joyce Hens Green in a related context, "[a]lthough consideration of the merits [of the legality of U.S. involvement in El Salvador] might reveal disagreement about the meaning of the WPR terms such as imminent involvement in hostilities, the most striking feature of the pleadings at this stage of the case is the discrepancy as to the facts." Crockett v. Reagan, 558 F. Supp. 893, 897 (D.D.C. 1983). (Judge Green dismissed the challenge to the President's failure to report to the Congress under the WPR the introduction of U.S. military personnel in El Salvador. The court held that the war powers issue presented a nonjusticiable political question. Specifically, Judge Green found that the trial court did not have the resources or expertise to resolve the particular factual disputes involved in the case, id. at 898, 899, and that Congress had taken no action which would suggest that it viewed

U.S. involvement in El Salvador as subject to the WPR. The court was sustained on appeal by the D.C. Circuit Court of Appeals. Crockett v. Reagan, 720 F. 2d 1355, 1357 (1983).)

The opposing previously described contentions reveal a similar disagreement over the meaning of key terms used by the WPR and the factual circumstances and events surrounding the recent U.S.-Libyan conflict. Each side's conclusion flows almost inexorably from its stated and assumed premises. For example, if it is assumed or stipulated that the conduct of naval maneuvers in the Gulf of Sidra was undertaken for the express purpose of provoking Libya into hostilities, or because various factors including past Libyan claims and statements regarding the Gulf and its leader's asserted erratic and wholly unpredicatable behavior made hostilities a reasonable likelihood, a case is made out for the need for compliance with the WPR. Conversely, placing all of these considerations aside and focusing exclusively on the right of the United States to conduct maneuvers as such or in combination with maintaining the freedom of the seas in a region that is recognized by all but Libya as being the high seas, it can be argued that, however otherwise desirable, compliance with the WPR was not strictly speaking legally required. In the absence of investigation and determination -activities that Judge Green in Crockett v. Reagan, 558 F. Supp. at 898, described as totally inappropriate for the judiciary -- it is difficult to determine whether as a matter of law U.S. forces in the Gulf of Sidra were introduced into a situation where imminent involvement in hostilities was clearly indicated by the circumstances.

As indicated, the principal contention in Crockett v. Reagan was that U.S. military officials had been introduced into situations in El

Salvador where imminent involvement in hostilities was clearly indicated by the circumstances and, consequently, the President's failure to report to Congress was a violation of the WPR and the war powers clause in the Constitution. U.S. Const. art. 1, § 8, cl. 11. In dismissing the litigation Judge Green made the following relevant observations:

> The Court concludes that the factfinding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture nonjusticiable. The questions as to the nature and extent of the United States' presence in El Salvador and whether a report under the WPR is mandated because our forces have been subject to hostile fire or are taking part in the war effort are appropriate for congressional, not judicial, investigation and determination. Further, in order to determine the application of the 60-day provision, the Court would be required to decide at exactly what point in time U.S. forces had been introduced into hostilities or imminent hostilities, and whether that situation continues to exist. This inquiry would be even more inappropriate for the judiciary.
>
> In Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), Justice Brennan identified several categories of "political questions". The question here belongs to the category characterized by a lack of judicially discoverable and manageable standards for resolution. ....
>
> ... the question presented does require judicial inquiry into sensitive military matters. Even if the plaintiffs could introduce admissible evidence concerning the state of hostilities in various geographical areas in El Salvador where U.S. forces are stationed and the exact nature of U.S. participation in the conflict (and this information may well be unavailable except through inadmissible newspaper articles), the Court no doubt would be presented conflicting evidence on those issues by defendants. The Court lacks the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact concerning the military situation in El Salvador. ... here the Court faces a dispute as to whether a small number of American military personnel who apparently have suffered no casualties have been introduced into hostilities or imminent hostilities. The subtleties of factfinding in this situation should be left to the political branches. If Congress doubts or disagrees with the Executive's determination that U.S. forces in El Salvador have not been introduced into hostilities or imminent hostilities, it has the resources to investigate the matter and assert its wishes. The Court need not decide here what type of congressional statement or action would constitute an official congressional stance that our involvement in El Salvador is subject to the

> WPR, because Congress has taken absolutely no action that could be interpreted to have that effect. Certainly, were Congress to pass a resolution to the effect that a report was required under the WPR, or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented. Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1976) (Powell, J., concurring).
>
> Even if the factfinding here did not require resolution of a political question, this Court would not order withdrawal of U.S. forces at this juncture. At most, it could order that a report be filed. This conclusion is based upon the structure and legislative history of the WPR. 558 F. Supp. at 898, 899.

Why has the WPR proven to be so difficult to apply in various circumstances? The reasons aside from narrow turf concerns are various, some extrinsic to and some intrinsic in the WPR. Among the former is that it impacts on an area of presidential power of uncertain contours. Although the courts have entertained numerous cases which involved some element of the President's military competence, this litigation has been brought by private individuals who claimed some injury to personal or property rights. As noted by Clinton Rossiter in The Supreme Court and the Commander in Chief (1951), the Supreme Court has refused to speak about the powers of the President as Commander in Chief in any but the most guarded and general of terms. In particular, "[i]t has fixed neither the outer boundaries nor the inner divisions of the President's martial authority, and has failed completely to draw the line between his powers and those of Congress, except to proclaim such self-evident dogmas as the Congress cannot direct campaigns nor the President declare war." 1980 Da Capo Press Reprint Edition at 5.

The debates in political and other forums have been largely inconclusive. An observation by Justice Jackson appropriately summarizes

the situation: "A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other." Youngstown Co. v. Sawyer. 343 U.S. 579, 634-635 (1952).

Although the foregoing partially explain why the debate on the war powers continues, they do not explain the original legal basis of the controversy. The latter in the main can be ascribed to three factors: the constitutional division of the national war powers among the political branches; the failure of the Constitution and its Framers to define certain key terms, such as what constitutes war; numerous historical incidents at odds with claims to total and absolute control by one branch or the other.

Clearly, if the congressional power to declare war was the equivalent of the power to make war, or what is tantamount to the same thing, if war as a matter of domestic law could not exist until formally declared by Congress, the case for unilateral presidential initiatives in the context under consideration or any context would be considerably weakened. If war in the constitutional sense comprehended not only solemnly declared and legislatively authorized wars but covered the universe of hostilities irrespective of their nature (e.g., offensive and defensive) or object (e.g., sovereign nations and terrorist groups), many claims advanced in support of the Commander in Chief would have little legal support. Finally, if historical practices followed an unswerving line, generalizations consistent therewith could be advanced and defended at least until the Supreme Court conclusively resolved the issue within the framework of an actual case or controversy. ("That an unconstitutional action

has been taken before surely does not render the same action any less unconstitutional at a later date." Powell v. McCormack, 395 U.S. 486, 547 (1969)). However, precedents involving the use of force authorized by Congress by means other than a declaration and absent congressional authorization altogether, offset claims to a monopoly of the area by either the Congress or the President.

As indicated, the Constitution divides the war powers between the Congress and the President. Congress is empowered "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Art. I, § 8, cl. 11. See, also, Art. I, § 8, cl. 1, tax and spend for common defense; cl. 2, raise and support armies; cl. 13, provide and maintain a Navy; cls. 13, 14 make rules governing the Army and Navy; cls. 15, 16, provides for calling forth, and organizing, arming, and disciplining the Militia. The President is made Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States.

Although evidence of the Framers' intent respecting the war powers is sparse, two points emerge from the available documentation. First, as was true of the English monarch, the President is Commander in Chief of the Army and Navy; however, unlike the King, he alone was not authorized to initiate or commence war. The Federalist No. 69, at 465 (J. Cooke ed. 1961) (Alexander Hamilton). Second, by vesting Congress with the power to "declare" war rather than to "make" war as was originally, proposed, the Framers "[left] to the Executive the power to repel sudden attacks," Farrand, 2 The Records of the Federal Convention of 1787, at 318-319.

In summary, the Framers apparently intended to invest the President with two authorities as a consequence of the title Commander-in-Chief. It undoubtedly places the Nation's armed forces under presidential command. Jackson, concurring, Youngstown Co. v. Sawyer, 343 U.S. at 641. Also, it empowers the President to conduct some kinds of warlike actions in defense of the country.

Implications from the latter authority contribute to the perplexities surrounding the subject of war powers. In substituting "declare war" for "make war", the Framers assumed that they were narrowing the range of congressionally authorized warmaking in order to give the President "the power to repel sudden attacks." Among the inferences that can be drawn from this word change is that the President to some indeterminate extent is empowered to make war. Even the assumption that this presidential power is confined to defensive as distinguished from offensive military operations does not resolve a host of imponderables. For example, if the power is strictly defensive does it obligate the Commander-in-Chief to wait until the attack has been launched or can he attempt to deter it by war or a preemptive strike? Briefly, the line separating offensive from defensive operations is not one that can be clearly drawn.

Another implication of the Framers' switch from "make war" to "declare war" so as to authorize the President to act in the event of an attack is that war can exist without it being declared by Congress. In other words while it belongs "exclusively to Congress to declare whether the nation, from a state of peace, shall go into that of war" (Jefferson), the country can wage war by means other than a declaration. Of the various wars or warlike incidents in which the United States have been involved only five have been formally declared by Congress.

Congress can authorize war by other means than a declaration. The difference between a war which is formally declared and one which is authorized was well understood in the eighteenth century. As explained in an early opinion, the difference between the two corresponds to the difference between general or "perfect war ... which destroys the national peace and tranquility, and lays the foundation of every possible act of hostility" and limited or "imperfect war ... which does not entirely destroy the public tranquility, but interrupts it only in some particulars, as in the case of reprisals." Case of the Resolution, 2 Dallas 12, 20 (1781). See also Bas v. Tingy, 4 Dallas 37, 43 (1800) and Talbot v. Seeman, 1 Cranch 1, 28 (1801).

While "[n]othing in our Constitution is plainer than that declaration of war is entrusted only to Congress ... a state of war may in fact exist without a formal declaration." Jackson, concurring, Youngstown Co. v. Sawyer, 343 U.S. at 642. This point was established in the Prize Cases, 2 Black 635 (1863). The case involved the blockade of the Confederacy, one of various extraordinary steps taken by President Lincoln at the outset of the Civil War. As war at that time had neither been declared nor authorized by Congress, the propriety of the seizure of four vessels in enforcing the blockade, a belligerent action, was raised. The Court dividing 5-4 held that the insurrection of the southern states was a "state of war" under both domestic and international law and that the President's proclamation of blockade and the taking of the ships as prizes were lawful.

Acknowledging that "[b]y the Constitution, Congress alone has the power to declare a national or foreign war" and that the President "has no power to initiate or declare a war either against a foreign nation or

a domestic State", Justice Grier's majority opinion describes how the nation in the circumstances became involved in war in the constitutional sense.

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral". ...
>
> ...
>
> This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.
>
> ...
>
> Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." 2 Black at 668, 669, 670. (Emphasis in original)

In summary, Congress has power to declare war and provide for the common defense of the Nation. Even v. Clifford, 287 F. Supp. 331 (D.C. Cal. 1968). It is constitutionally permissible for Congress to use another means than a formal declaration of war to give its approval to a

war. "Any attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences, without any obvious compensating advantages other than a formal declaration of war does have special solemnity and does present to the legislature an unambiguous choice. While those advantages are not negligible, we deem it a political question, or, to phrase it more accurately, a discretionary matter for Congress to decide in which form, if any, it will give its consent to the continuation of a war already begun by a President acting alone. .... That is, we regard the Constitution as contemplating various forms of congressional assent, and we do not find any authority in the courts to require Congress to employ one rather than another form ..." Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973).

Finally, there are some types of war which the President can wage without congressional approval. "Implicit in plaintiffs' contention is their assumption that the Constitution gives to the Congress the exclusive right to decide whether the United States should fight all types of war. Without at this point exhaustively considering all possibilities, we are unanimously of the opinion that there are some types of war, which without Congressional approval, the President may begin to wage: for example, he may respond immediately without such approval to a belligerent attack, or in a grave emergency he may, without congressional approval, take the initiative to wage war. Otherwise the country would be paralyzed. Before Congress could act the nation might be defeated or at least crippled. In such unusual situations necessity confers the requisite authority upon the President. Any other construction of the Constitution would make it self-destructive." 488 F.2d at 613-614.

The WPR did not resolve the fundamental problems brought on by the shared nature of the power in question, the absence of precise definitions and two hundred years of inconsistent practice, but swept them under a procedural counterpane. Evidence to date indicates that these and other unanswered questions -- for whatever reasons -- refuse to be obscured.

In addition to operating on an indeterminate subject, the WPR has certain internal problems. There exist various obvious tensions among certain provisions of the War Powers Resolution and the Commander-in-Chiefship powers. Illustrative of the former is the apparent conflict between the "Purpose and Policy -- Congressional Declaration" section, 50 U.S.C.A. § 1542, which, inter alia, purports to limit presidential use of U.S. Armed Forces in hostile situations, actual or potential, to three specified circumstances, and a reading of the reporting and congressional action section, 50 U.S.C.A. §§ 1543 and 1544 so as to mean that the President is authorized to use such forces in combat as long as he complies with the reporting requirement and Congress does not adopt a disapproving resolution, 119 Cong. Rec. 33860, 33870, 33872, 36207 (1973). An example of the latter is the seeming contradiction between the same "Purpose and Policy, etc." section and the range of pure Article II initiatives. The uncertainty is heightened by the legislative history which indicates that that section is not deemed to be controlling of the substantive provisions of the War Powers Resolution. See House Report No. 93-547 at 8.

Also, the WPR does not -- and perhaps because of the dynamic character of the subject it affects, could not -- exhaustively define certain key terms such as consultations and "imminent involvement in hostilities". While legislative history sheds some light on the meaning of consultation, i.e., joint participation not simply the conveyance of information, House

Report No. 93-287 at 6-7, it also makes clear that advance notice is not always required. House Report No. 93-547 at 8. Similarly, although the legislative history spells out by way of illustrations the three circumstances that require a report and start the 60-day termination clock running, neither the language of the WPR nor the mentioned illustrations deals with the conduct of naval maneuvers in international waters or airspace.

For these and other reasons, we are no more able to answer to the question of presidential compliance or noncompliance with WPR in the recent conflict with Libya than Judge Green with regard to U.S. involvement in El Salvador that was at issue in Crockett v. Reagan.

Raymond J. Celada
Senior Specialist In
American Public Law

APPENDIX 11

U.S. Action Against Libya in the Gulf of Sidra: War Powers Issues: a Summary Prepared by Ellen C. Collier, Specialist in U.S. Foreign Policy, Foreign Affairs and National Defense Division, Congressional Research Service, Library of Congress

I. INTRODUCTION

On March 24, 1986, Libyan forces fired missiles at U.S. aircraft participating in naval exercises in internation waters of the Gulf of Sidra. The United States fired missiles in response and destroyed two Libyan ships and an on-shore anti-aircraft radar site. On March 25 U.S. missiles hit another Libyan vessel. On March 27 the United States ended its naval exercises and withdrew from the Gulf of Sidra. This paper examines issues raised by the President's use of Armed Forces in the Libyan situation relative to the War Powers Resolution (P.L. 93-148), which dates from November 7, 1973, when it was passed over the veto of President Nixon.

Many of the War Powers issues have been raised by earlier incidents. These include whether U.S. forces had been introduced into a situation where hostilities were imminent, whether the War Powers Resolution applied, and whether it would have been proper for the President to consult with Congress in advance. As in the majority of earlier cases, congressional response did not raise a major controversy because the action was of short duration and essentially over by the time it was reported.

A few new issues emerged in the Libyan situation. One of these is under what circumstances can or should legitimate activities such as the exercise of rights in international waters be seen as sufficiently provocative as to constitute the introduction of forces into imminent hostilities. Another is how responses to international terrorism should be handled under the War Powers Resolution. A third is whether it matters if the President acknowledges the application of the War Powers Resolution.

I. ISSUE OF WHETHER U.S. INTRODUCED ARMED FORCES INTO SITUATION INVOLVING IMMINENT HOSTILITIES

A basic issue is whether U.S. Armed Forces were introduced into hostilities or a situation where "imminent involvement in hostilities is clearly indicated by the circumstances." Section 2(a) of the War Powers Resolution states its purpose is to insure that the collective judgment of both the Congress and the President is applied in these situations. Introduction of forces into hostilities or imminent hostilities also is the criteria for the consultation requirement in section 3 and the reporting requirement in section 4 (a)(1) that triggers the 60-90 day limitation on use of forces without specific congressional authorization.

One problem appears to be the lack of agreed criteria or definition of hostilities or situations of imminent hostilities. The report of the House Foreign Affairs Committee in 1973 gave this explanation:

> The word hostilities was substituted for the phrase armed conflict ... because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "Imminent hostilities" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict. 1/

Brian Atwood, an assistant Secretary of State for congressional relations in the Carter Administration, wrote that in a similar exercise in the Gulf of Sidra in 1981, Reagan Administration lawyers asked the Pentagon to determine the likelihood that U.S. forces would become engaged in combat. If the "probability of conflict" rose to 50 percent or above, they said, consultation would be required by the War Powers Resolution. In addition,

1/ H. Report 93-287, p. 7.

when the Navy requested a change in the rules of engagement that would allow Navy pilots to fire on Libyan planes when they "locked on" with their radars, administration lawyers warned a change in the rules would indicate that the administation knew that hostilities were indicated by the circumstances. Consequently, the rules were not changed. 1/

The main question does not relate primarily to the missile firings of March 24 and 25 which were responses to Libyan missile attacks. Section 2(c) of the Resolution specifies that the President's powers to introduce armed forces into such situations are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces. The Administration has emphasized that the United States forces responded in self-defense against missile attacks by Libya. No U.S. sources have contradicted that the Libyan forces did fire first.

The main question is whether by undertaking exercises in the Gulf of Sidra on March 23 U.S. forces were being introduced into a situation in which imminent hostilities were clearly indicated by the circumstances. This question has become clouded by its intermingling with the issue of freedom of the seas. The President holds that on March 23, 1986, the United States began a peaceful exercise in the Gulf of Sidra as part of a global freedom of navigation program by which the United States preserves its rights to use international waters and air space, and that several exercises in the same area have been conducted on previous occasions.

1/ Atwood, J. Brian. Congress: Bypassed Again. Washington Post, March 30, 1986, p. D8.

Some observers contend that not only did the President realize that he was dispatching forces into an area in which hostilities were likely, but that he was hoping to provoke the Libyan leader into firing first. U.S. naval exercises in the Gulf of Sidra have caused tension for many years because Libya claims the entire Gulf while the United States and other nations claim that the Gulf constitutes international waters except for a 12-mile territorial water limit. In their view the question is not the right to conduct exercises but whether under the particular circumstances they constituted a situation of imminent hostilities.

For the War Powers Resolution, an issue is whether the correctness of the U.S. position on the freedom of the seas, or the motivation for the U.S. exercises, is relevant to the consultation and reporting requirements. Clearly they would be relevant in determining the nature of congressional advice or action. The Administration has taken the position that the War Powers Resolution did not apply because the United States was simply conducting an exercise, that "We obviously cannot be deterred from exercising our rights by Qadhafi's legally baseless claims or by his threats." 1/ The consultation and primary reporting requirements, however, make no mention of justifications. Their sole criterion is whether forces are introduced into hostilities or situations where imminent hostilities are clearly indicated by the circumstances. Some analysts argue that imminent hostilities were clearly indicated by the circumstances.

On January 25, 1986, Qadhafi held a press conference before sailing into the Gulf of Sidra and said, "I am going out to the parallel 32.5,

1/ Letter from William L. Ball, III to House Foreign Affairs Committee Chairman Dante Fascell, March 26, 1986.

which is the line of death, where we will stand and fight with our backs to the wall." 1/ Earlier in January he had said that the United States was using terrorist incidents as an excuse to attack Libya, was engaged in an act of war by massing ships against him, and that a U.S. attack would lead to a Mediterranean war, a Middle Eastern War, or perhaps a world war. 2/

Tensions between the United States and Libya, which had been high for many years, had mounted steadily since terrorist incidents at the Rome and Vienna airports on December 27, 1985. On January 7, 1986, President Reagan found "that the policies and actions of the Government of Libya constitute an unusual and extraordinary threat to the national security and foreign policy of the United States" and declared a national emergency to deal with that threat. Invoking authorities in the International Emergency Economic Powers Act, the National Emergencies Act, and other legislation, he ordered additional economic sanctions including the prohibition of imports from and exports to Libya, banning of U.S. Libya maritime and aviation relations, freezing of Libyan assets, and prohibition of travel by Americans to or in Libya. 3/

In a press conference on January 7, 1986, President Reagan said, "The Rome and Vienna murders are only the latest in a series of brutal terrorist acts committed with Qadhafi's backing...By providing material support to to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international

1/ Goldsmith, Michael. Qaddafi Sails Near U.S. Exercises. Washington Post, January 26, 1986, p. A 21.
2/ Libya: U.S. Relations. CRS Issue Brief IB 86040, by Raymond W. Copson, Ellen B. Laipson, and Clyde R. Mark.
3/ Executive Order 12543, January 7, 1986.

law, just as if he had used its own armed forces." 1/ The Department of State issued a document on January 8, 1986, entitled "Libyan Sanctions" which alleged Libyan involvement in a large number of events straining relations, including assassination attempts and attacks against U.S. diplomats and embassies. On August 19, 1981 U.S. planes based on the carrier Nimitz had shot down two Libyan jets over the Gulf of Sidra after one of the Libyan jets had fired a heat-seeking missile. Press reports stated that on January 6 and 7, 1986, the President ordered that more money and manpower be devoted to the development of a CIA covert operation against Qaddafi. 2/ More recently it was reported that the United States had discussed with Egypt a joint attack on Libya in which U.S. support would include extensive bombing. 3/ For some observers, the presence of Soviet technicians and surveillance ships in the area added to the danger.

On January 23, 1986, the Administration ordered two aircraft carrier battle groups in the Mediterranean to begin flight operations north of Libya, one official describing it as "part of the war of nerves" between the United States and Libya. 4/ The Navy issued a "Notice of Intent to Conduct Flight Operations" through the International Civil Aeronautical Organization, stating that the operations would be in international airspace in the Tripoli Flight Information Region. The operations were conducted on January 27 and 28, 1985, at which time Qadafi claimed the United States was planning to invade Libya. 5/

1/ Weekly Compilation of Presidential Documents, January 13, 1986, p. 22.
2/ Woodward, Bob and George C. Wilson. U.S. Navy Planes to Begin Operations North of Libya. Washington Post, January 24, 1986, p. 1.
3/ Woodward, Bob. One Option Involved Extensive Bombing. Washington Post, April 2, 1986, p. 1.
4/ Woodward, Bob and George C. Wilson. U.S. Navy Planes to Begin Operations North of Libya. Washington Post, January 24, 1986, p.1.
5/ Ibid., p. A 26.

III. ISSUE OF CONSULTATION

In the Libyan case there is general agreement that consultation did not occur but disagreement on whether it was required. Section 3 requires the President to consult with Congress in every possible instance before introducing forces into situations of imminent hostilities.

The first question is whether the condition of imminent hostilities existed. On March 24, 1986, House Foreign Affairs Committee Chairman Dante B. Fascell wrote President Reagan that in deploying U.S. forces to the Gulf of Sidra he had failed to satisfy the requirement of the War Powers Resolution for prior consultation with Congress. "As demonstrated by today's reported attack, these deployments constituted from the outset a situation where imminent involvement in hostilities was a distinct possibility clearly indicated by the circumstances even prior to today's development." 1/

William L. Ball, III, Assistant to the President, replied on March 26 that the Administration did not believe the Resolution was intended to require consultation before conducting naval maneuvers in international waters or airspace. He continued:

> We considered this question carefully and concluded that conducting the operations did not place U.S. forces into hostilities or into a situation in which imment hostilities were clearly indicated by the circumstances. Contrary to your letter's suggestion, it is not enough under the statute that an operation create "a distinct possibility" of hostilities. After Libya attacked our forces, we notified congressional leaders. 2/

1/ Letter from House Foreign Affairs Committee Chairman Dante B. Fascell to President Reagan, March 24, 1986.

2/ Letter from William L. Ball, III, to House Foreign Affairs Committee Chairman Dante B. Fascell, March 26, 1986.

In practice, if the Administration says the imminence of hostilities did not exist, that view governs administration actions in the absence of congressional action to the contrary.

A second issue is whether time permitted consultation and at what point the the consultation requirement should have been triggered. Three time periods might be considered: (1) the time of the Libyan missile firing; (2) the crossing of the "line of death"; and (3) the decision to conduct exercises in the Gulf of Sidra.

(1) The time when hostilities actually occurred was during the missile firings on March 24. There were a few hours between the firing of the Libyan missiles and the U.S. firing of its missiles in return. The first Libyan firing reportedly occurred at 7:52 a.m. E.S.T. and the sixth at 1:14 p.m. The first U.S. missile was fired at 2 p.m. A case could be made that this allowed time for consultation, but a case could also be made this was not a situation in which consultation was possible. The military and executive branch decision making process alone appeared to take a considerable length of time and rapid action might have been necessary to defend U.S. forces from further attack.

(2) The time when forces were first introduced into a situation which some might consider imminent hostilities was when U.S. forces apparently entered the Gulf of Sidra across the 36° 30" parallel on March 23. More than a week passed between the time the decision was made and the time the line was crossed.

(3) The most crucial time may have been prior to the decision to conduct military exercises in the Gulf. President Reagan apparently approved the freedom of navigation exercise in the Gulf on March 14 and on March 20 the Administration

announced that three ships would cross the "line of death" within two weeks. A case might be made that the United States had been considering various responses to Libya ever since the Vienna and Rome terrorist incidents on December 27, 1985, and that the President could have consulted Congress about this decision any time during January, February, or early March.

Occasionally in situations relevant to the War Powers Resolution the issue of the need for secrecy has been raised. For example, President Carter contended he could not consult with Congress prior to the attempt to rescue American hostages in Iran in 1980 because of the need for secrecy. The deployment of forces to the Gulf of Sidra, however, was accompanied by considerable publicity.

In many earlier instances involving the War Powers Resolution Congress has complained about the lack of adequate consultation. A number of problems have been indicated. One is that the circumstance that calls for consultation requires a report under section 4(a)(1) which triggers the 60-90 day time limitation unless there is specific congressional authorization. Another is that the resolution does not specify which Members of Congress the President is supposed to consult. Still another is that it is not made clear what consultation entails and to what degree it requires securing congressional approval.

None of these questions appear to have been raised in the Libyan situation, but the reluctance of Presidents to consult with Congress in this and similar situations indicates further study of the issue might be desirable.

IV. ISSUE OF REPORTING

The President appears to have substantially fulfilled the reporting requirements of the War Powers Resolution. The report he filed did not make any reference to the Resolution, but the reporting requirement does not call for the report to refer to the War Powers Resolution or any particular section of it. The timing of the report is unclear; it was dated March 26 and released March 27.

Section 4 of the War Powers Resolution requires the President to report, within 48 hours, the introduction of U.S. forces in three cases:

(1) into hostilities or into situations where imminent hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.

A report filed under the first condition, section 4(a)(1) concerning hostilities or situations of imminent hostilities, triggers section 5(b) which requires the President to terminate the use of the armed forces unlesa Congress has declared war or authorized the further use of the forces. A report filed under the other two conditions, sections 4(a)(2) and 4(a)(3) does not trigger the time limit.

President Reagan reported to the Speaker of the House and the President pro tem of the Senate, the designated recipients of War Powers reports, describing the incident. He said he was providing the report "in accordance

with my desire that the Congress be informed on this matter." Although he did not cite the War Powers Resolution or any particular section, his submission would have been relevant only to section 4(a)(1) relating to hostilities or imminent hostilities.

To all appearances the report met the reporting requirements of section 4 (a) by setting forth the three required elements: (A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which the introduction took place; and (C) the estimated scope and duration of the hostilities or involvement. The President reported that the measures taken in self-defense during this incident were undertaken pursuant to his authority under the Constitution, including his authority as commander in chief. The President also stated that U.S. forces would continue with their current exercise and "If Libyan attacks do not cease, we will continue to take the measures necessary in the exercise of our right of self-defense to protect our forces."

How significant is the lack of acknowledgment of the War Powers Resolution in the report on the Libyan incident? All previous reports filed under the requirements have at least taken note of the Resolution although only one, the one filed after the Mayaguez situation, referred to Section 4(a)(1) which triggers the time limit of 60-90 days. The lack of a specific citation to 4(a)(1) has not proven an unsurmountable obstacle to further action under the War Powers Resolution. In the Multinational Force in Lebanon Resolution, Congress established a precedent that Congress can determine that the requirements of section 4(a)(1) have become operative. 1/

1/Public Law 98-119, approved October 12, 1983. In signing the Act, President Reagan stated that his signing should not be viewed "as any acknowledgment that the President's constitutional authority can be impermissibly infringed by statute."

Nevertheless, the insertion of a reference to the War Powers Resolution indicates that a President recognizes the Resolution and that Congress has a legitimate role in decisions that might get the United States involved in hostilities.

V. ISSUE OF CONGRESSIONAL RESPONSE

The issue of whether the U.S. action or the report submitted on March 27 triggered the 60-90 day time limit in the War Powers Resolution and whether congressional authorization for further stay would be required quickly became moot. On March 27, according to press reports, U.S. ships ended their exercises within the area claimed by Libya.

In instances in which the President utilizes armed forces, decisions on invoking the War Powers Resolution become intertwined with opinion on the merits of the use of force in that particular instance. Several congressional leaders briefed on the incident immediately afterward expressed support for the President's action. Speaker of the House Thomas P. O'Neill, Jr. said the Administration's handling of the matter was"on the right course." House Minority Leader Robert Michel said, "As far as I'm concerned, Libya engaged in an act of provocation that warranted our response." President pro tem of the Senate Strom Thurmond said, "The United States has the right and the duty to protect itself when attacked, as it was today, without provocation." 1/ Senate Majority Leader Robert Dole said, "On this issue, Americans are united; Republicans and Democrats alike. We will not tolerate attacks; we will not give in to threats and intimidation; we will defend our interests. We support our President. ..." 2/

1/ New York Times, March 25, 1986, p. 1, 11./
2/ Congressional Record, March 25, 1986, p. S 3284.

But there was some disagreement with the policy. Senator Mark Hatfield stated, "I dissent because I believe there is a clear difference between what the United States has a right to do and what is in our best long-term interest. Wisdom, not technical rights, must dictate U.S. policy at all times." 1/

In commenting on the action, most Members did not mention the War Powers Resolution. Those who did disagreed on its applicability. Senate Minority Leader Robert Byrd said, "As to the War Powers Act, I personally do not believe that that act seizes at this point." 2/ Chairman of the House Foreign Affairs Committee Dante Fascell, however, wrote President Reagan on March 24 that the deployments "constituted from the outset a situation where imminent involvement in hostilities was a distinct possibility clearly indicated by the circumstances even prior to today's development," and urged him to comply fully with the provisions of the Resolution. 3/ The next day Senator Sam Nunn concurred that a report to Congress under the Resolution was required. 4/

VI. ISSUE OF RESPONSE TO TERRORIST ACTIVITIES

Although undertaken as an exercise to maintain freedom of the seas, the U.S. action in Libya was widely considered a response to Qadhafi's alleged sponsorship of terrorist activities. President Carter's attempt to rescue the U.S. hostages in Iran in 1980 was also a response to a terrorist act. It is possible that additional responses involving imminent

1/ Congressional Record, March 26, 1986, p. S.3454.
2/ Congressional Record, March 25, 1986, p. S 3284./
3/ Letter from Fascell to President Reagan, March 24, 1986.
4/ Congressional Quarterly, March 29, 1986, p. 699.

hostilities could occur because the growing number of terrorist incidents has caused a search for ways for the United States to halt them. The question is whether such actions are different from other potential uses of armed force.

Some observers believe that the nature of terrorist activities requires a quick response that precludes consultation with Congress. Other observers believe that many military responses are likely to risk entanglement in hostilities or even a war, so Congress should participate in the decisions in some way.

Apparently the Reagan Administration has considered asking Congress for a resolution to empower the executive branch to use "whatever military force is required" to deal swiftly with the terrorist threat. 1/ Debate on such a resolution could involve Congress in the general decision to respond to terrorist activities with military force. A major issue would very likely be whether such a resolution would constitue an authorization for the use of armed forces under the War Powers Resolution against future acts of terrorism.

1/ Washington Times, January 17, 1986, p. 2.

APPENDIX 12

Letter From Members of Congress to Chairman Fascell (April 28, 1986) Enclosing Copy of April 11 Telegram to President Reagan

RECEIVED

APR 29 1986

Committee on Foreign Affairs

April 28, 1986

Hon. Dante Fascell
Chairman
Committee on Foreign Affairs
2170 Rayburn Building
Washington, D.C. 20515

Dear Mr. Chairman:

As members long concerned with Congress' constitutional war-making authority, we want to express our support and admiration for your outspoken defense, at a critical time, of both the War Powers Act and the Constitution.

We commend you also for calling prompt oversight hearings on the question of the Executive Branch's compliance with provisions of the War Powers Act, insofar as the two recent Libyan operations were concerned.

Although we are not here questioning the President's decision to use military force in the case of Libya, we hope you will underline to the Administration witnesses our deep concern over the apparent non-compliance of the Executive Branch with both the letter and the intent of the War Powers Act. The fact that the U.S. bombers had left Britain for Libya hours before Congressional leaders were brought to the White House reveals that Congress was not "consulted" as to military options -- but rather was "informed" as to what was occurring. Asking those leaders at that point whether they had any "objections," after the mission was well on its way and without having time to analyze the facts and the likely consequences, can hardly be considered meaningful consultation. The fact that Ambassador Walters had been meeting with our NATO Allies for several days before Members of Congress were notified reveals to us that there was ample time for consultation with Congress, in accordance with Section 3's mandating of consultation "in every possible instance."

These facts alone, compounded by the failure of the Executive Branch to invite to its briefing certain key Congressional leaders (such as the Chairman of the House Intelligence Committee) lead us to conclude that the Executive Branch not only failed to comply with the consultation provision, but indeed may have consciously

sought to avoid Congressional consultation. This concern is aggravated by the fact that we -- along with other Members of both parties and both bodies -- had made a special point to remind the President of his responsibilities to consult prior to military action. As of possible interest, and perhaps to be made part of your hearing record, we enclose a copy of the telegram we sent the President on the Friday before the Monday operation, quoting the language of the law and clarifying its legislative intent.

Once again, we commend both your statements and your actions upholding Congress' Constitutional and legal responsibilities for military actions against foreign nations. We look forward to working with you in the future.

With best regards.

Sincerely,

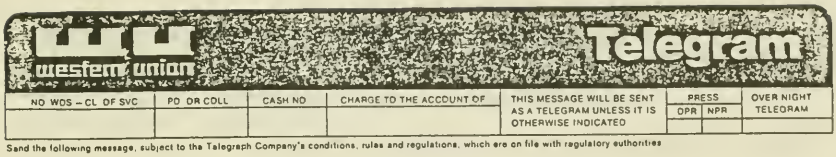
Matthew F. McHugh
Member of Congress

John F. Seiberling
Member of Congress

Mark O. Hatfield
U.S. Senator

Don Edwards
Member of Congress

Morris K. Udall
Member of Congress



April 11, 1986

The President
The White House
Washington, D.C. 20500

We have noted over the last few days a growing crescendo of statements from officials of your Administration and from you personally suggesting military action against Libya may be imminent.

At your press conference this week, you stated that you believed "we should respond" if our intelligence linked Libya to the Berlin bombing in which a U.S. serviceman was killed. Today's newspapers quote NATO commander Gen. Rogers as claiming that such evidence is now "incontrovertible."

While we share your deep concern over acts of terrorism and over the instigation by Col. Qaddafi of such acts, and while we believe that our nation must respond forcefully and effectively to such acts, the War Powers Act is crystal clear in requiring that you consult with Congress before, not after, military action is initiated, and that you consult fully and substantively, not in a pro forma manner. Specifically, section 3 of the Act requires that the President "in every possible instance shall consult with Congress before introducing U.S. armed forces into hostilities or situations where imminent involvement in hostilities is clearly indicated . . ."

As then-Chairman of the Foreign Relations Committee, Sen. J. William Fulbright, said, the consultation provision of the Act is "the most fundamentally important of all." As his colleague and principal author of the Act, Senator Jacob Javits, stated, this section "is to be read as maximal rather than minimal."

We understand that there have been differing interpretations in the past of the War Powers Act. However, in this case there can be absolutely no doubt as to its intent: contingency plans are apparently already framed, Congress is in session, and there is and in fact already has been ample time for full and thorough Congressional consultation. To our knowledge, there has been no consultation with Congress of the kind required by the Act.

- - M O R E - -

WU 1211 (RI-70)

western union Telegram

NO. WDS.	CL. OF SVC	PD. OR COLL.	CASH NO.	CHARGE TO THE ACCOUNT OF	THIS MESSAGE WILL BE SENT AS A TELEGRAM UNLESS IT IS OTHERWISE INDICATED	PRESS DPR	PRESS NPR	OVERNIGHT TELEGRAM

Send the following message, subject to the Telegraph Company's conditions, rules and regulations, which are on file with regulatory authorities.

Ultimately, the circumstances may or may not justify a military action of some kind — whether retaliatory, preemptive, or otherwise. But since such action could be an act of war, and since both the Constitution and the War Powers Act lay out Congress' role in making war, the President has a Constitutional responsibility as well as a legal obligation to consult with Congress in advance of any action.

(Signed)

MARK HATFIELD, U.S.S.

CHARLES McC. MATHIAS, U.S.S.

JIM LEACH, M.C.

MORRIS K. UDALL, M.C.

JOHN F. SEIBERLING, M.C.

MATTHEW F. McHUGH, M.C.

DON EDWARDS, M.C.

HOWARD BERMAN, M.C.

WU 1211 (Rl-70)

APPENDIX 13

Statement by Hon. John F. Seiberling, a Representative in Congress From the State of Ohio

Mr. Chairman, I appreciate the opportunity to submit this statement for the record of the Foreign Affairs Committee's hearing on terrorism and the War Powers Act. Although I would have preferred to appear as a witness, my duties as chairman of the Subcommittee on Public Lands prevent me from appearing in person at today's hearing.

These hearings follow in the wake of the Reagan Administration's decision to order a retaliatory air strike against Libyan military and terrorist support facilities. On April 14, U.S. F-111 bombers based in England, and U.S. carrier-based aircraft, launched a series of strikes against targets near the Libyan cities of Tripoli and Benghazi. The attacks were ordered after the Reagan Administration reportedly obtained irrefutable evidence that the recent Berlin discotheque bombing was carried out by Libyan terrorists operating under direct orders of the Qaddafi government.

The April 14 air strike marks the latest escalation in a series of confrontations between the United States and Libya over Libya's in-

volvement in acts of international terrorism. It also marks the latest round of efforts by the United States Government to forge a policy for combatting the spread of international terrorism, in part by demonstrating U.S. determination to carry the battle against such terrorism to its home base, if indeed Libya can be said to be the source of much of the terrorist acts which have confounded the Western world in the past few years.

My views on the utility of the April 14 action are a matter of public record. Although I will touch on those views briefly, since I think they are germane to the issue, I do not wish to engage in an extensive post-mortem of the Libya raid today, since the focus of the Committee's hearings today are on the War Powers Act, and more particularly on S. 2335, the Anti-Terrorism Act of 1986, introduced in the Senate by Senators Dole and Denton.

First, let me say that I believe that the United States has no choice but to develop, if possible in concert with other countries, a forceful and effective policy to counter terrorism. It appears that a good beginning toward the development of a coordinated policy has been made at the Tokyo "summit" meeting between President Reagan and leaders of six other democratic nations. Such a policy should have a number of components, including tightened security at airports, embassies, and other critical areas, improved police and counter-intelligence work, diplomatic and economic pressure, and, where appropriate,

the use of varying levels of military force. However, I do not believe that military force should be used where other methods are feasible and potentially effective, particularly if there is a high probability that innocent persons will be injured or killed.

The forcing down, by U.S. fighter planes, of the Egyptian airliner that carried the terrorists who hijacked the ship, Achille Lauro, was clearly an example of appropriate and effective use of military force. On the other hand, the nighttime surprise bombing attack on the Libyan cities by U.S. aircraft was, in my opinion, an unwise and inappropriate use of military force. Even though it was provoked by outrageous terrorist actions instigated by Qaddafi against American citizens, the resulting destruction of dwellings and the deaths of numbers of civilians are incompatible with American traditions of decency and respect for human life. This action undermined our influence in the international community and created another group of "martyrs" to fan the passions and hatred that breed more terrorists. Violence begets violence. Indeed, the attack was soon followed by a new wave of terrorist acts against American and British citizens in various parts of the world. It has already placed strains on relationships with our NATO allies, weakening us against the far greater military threat posed by the Soviet Union. It may also force moderate Arab states of great importance to our security, states such as Egypt and Saudi Arabia, to reduce their ties to the U.S.

60-907 O - 86 - 10

In any event, the terrorism menace is far from ended, nor would it be even if Libya's Qaddafi had been eliminated. Syria and Iran, not to mention various Palestinian and Lebanese factions, remain untouched, although the rulers of Syria and Iran have witnessed a sobering demonstration of one possible consequence of state-sponsored terrorism. Moreover, the Libya raid did nothing toward resolving the underlying political and social issues that have spawned terrorist activity.

How then, would S. 2335 attempt to resolve the menace of terrorism? In the words of Senator Dole, S. 2335 purports to "make clear in law — and equally important to make clear to the world, including the world's terrorists — that the President does have extensive, flexible authority to do what is necessary to strike back against terrorists and to preempt planned terrorist attacks against the United States and its citizens." Passage of S. 2335 would, according to its sponsor, "cement the authority in law and send a strong message around the globe: The President has the power to act and has the political backing of the American Congress in doing what he must." In other words, S. 2335 is primarily a "get tough" message from the Congress.

What would the bill do? In brief, the bill would effectively suspend the consultation and reporting requirements of the War Powers Act, as well as the inherent "time clock" for unilateral deployment of U.S. armed forces set by that Act, in the event that the President

determines that specific action is necessary to combat terrorism. S. 2335 would suspend the War Powers Act not just for retaliatory action, but also for preemptive action. And it would suspend the War Powers Act not simply for retaliatory or preemptive action against those individuals or groups which are directly involved in the planning or conduct of terrorist acts, but would also do so for groups or governments "which directly support such planning or acts." As Senator Dole noted in his introductory remarks in the Congressional Record, "It is not only the bomb throwers we have to deal with; it is everyone in the network, up to and including governments like Libya's, which openly and aggressively espouse state-sponsored terrorism as an instrument of policy . . ."

S. 2335 establishes in law the ability of the Executive to do as it sees fit to combat terrorism, without regard for any other provisions of law, or presumably without regard for the fact that the Constitution vests with the Congress, not the President, the power to declare war. Its sponsors, no doubt, have the best of intentions. I do not know of any Member of the House or Senate who dismisses the threat of international terrorism, or who would object to a carefully-thought-out legislative policy to combat such terrorism.

Yet for all its good intentions, S. 2335 represents congressional policy-making at its least responsible. It is, without a doubt, 1986's Gulf of Tonkin resolution — a blank check for any kind of mil-

itary action against any individual, group, or government that the Executive unilterally determines to be supporting, aiding, or directly involved in acts of international terrorism.

But is enactment of S. 2335 necessary? Do we need to suspend the War Powers Act to enable the President to respond quickly and effectively to terrorism? Even a cursory examination of the War Powers Act reveals that the answer to these questions must be "No." Section 3 of the War Powers Act specifically requires that the President "in every possible instance shall consult with Congress before introducing U.S. armed forces into hostilities or situations where imminent involvement in hostilities is clearly indicated . . ." As then-Chairman of the Senate Foreign Relations Committee, J. William Fulbright, said, the consultation provision of the Act is "the most fundamentally important of all."

As I understand the development of the decision to retaliate against Libya for the Berlin discotheque bombing, the President made the basic decision to respond militarily as much as five, possibly ten, days before the actual raid was carried out. If so, there was ample time for full and thorough consultations with Congress before the raid was begun. Yet consultations with Congress were not undertaken until after the F-111s had left their bases. Confronted with a fait accompli, with no opportunity for reflection or evaluation of other options or likely consequences, what could Members of Congress

do but to pledge their support for the action and hope that it was well-thought-out and that it will achieve the desired result. This was not consultation, but rather cursory notification. The vehemence with which presidential press spokesman, Larry Speakes, dodged questions about the timing of the decision to bomb Libya should be taken for what it appears to be — a clear acknowledgement that the decision had been made in ample time to fully consult with Congress under the requirements of the War Powers Act. Given that, I think that there can be no question but that President Reagan probably violated the letter and certainly violated the intent and spirit of the War Powers Act with his last minute "consultation" during the April 14 raid.

It is to the credit of this Committee and its distinguished Chairman that it has launched an oversight investigation into just how this egregious circumvention of the Constitution and the War Powers Act was brought about. And it is to the discredit of the sponsors of S. 2335 that their principal response has been to use the rightful public concern and outrage over terrorism as an opportunity to seek to effectively repeal the War Powers Act and to give the President a "blank check" declaration of war whenever he wants to initiate military action against a government that he unilaterally decides is "involved" in "terrorism." This is a power the President should not be given, and, frankly, should not want. Faced with a decision of such gravity, a President should want the benefit of consultation as

required by the War Powers Act. Yet the sponsors of S. 2335 assume that the Act is defective and the Constitution obsolete, insofar as it confers on Congress the sole power to declare war. Their "solution" would effectively repeal these inconvenient impediments to war-making by the Executive whenever the Executive can devise some plausible connection between the proposed military action and the rather broad definitions of terrorism laid out in the bill.

Some will attempt to justify such legislation on the grounds that, in an operation as delicate as the Libya raid, absolute secrecy is required to ensure the safety of all military personnel involved. Such secrecy, they will contend, precludes the allegedly rigid consultation requirements established in the War Powers Act. These contentions are simply nonsense. They presume that those Members of Congress notified under the War Powers Act are unable to preserve the secrecy essential to successful military operations, despite the lack of any record showing that in past years Members of Congress have significantly compromised the secrecy of any proposed military action on which they were consulted.

The secrecy argument also presumes that the Act requires briefing Members on the minute technical details of a proposed military attack, such as the precise forces that would be used, timing of the assault, routes to target, and the like. The consultation required by the War Powers Act relates to the strategic, political, economic, and other

basic policy issues involved in initiating a military action, not the tactical aspects, which are more appropriately left to the Commander-in-Chief. The essential question for the Congress is "whether;" the question of "how" is mainly for the President.

Surely, before any more military strikes are used to deal with a terrorist problem, Congress should have the opportunity to raise the key questions, such as: What are the long-range political consequences likely to be? Is such an attack likely to deter or stimulate further terrorism? How will other nations react? Is there any other diplomatic, economic, or political action which can be taken which will better serve our objective of deterring terrorism?

It may be that such things were fully considered by President Reagan before he ordered the attack on Libya. It may also be that military actions less likely to endanger civilians (such as a naval blockade or mining Libya's oil loading seaports) were considered and ruled out as not feasible. Unfortunately, we in Congress simply do not know, because not even the leaders of Congress were consulted, nor was their advice sought, before the President made the decision to launch the bombing attack. S. 2335 would provide a congressional blessing for this foolish, shortsighted, and dangerous approach.

A continuation of such an approach will make it all but impossible to develop a bipartisan foreign policy consensus, without which an effective struggle against terrorism will be much more difficult to achieve. Enactment of S. 2335 would cast aside the bitter lessons learned in the Vietnam era.

The Congress, under the Constitution, has an important and fundamental role to play in the development and execution of foreign policy, especially in matters involving the initiation of wars and acts of war. The War Powers Act represents a legislative watershed — a congressional declaration of its determination to be involved in these grave matters and not left merely as a group of cheerleaders on the sidelines, while the Executive does what it will without regard for congressional concerns.

Enactment of S. 2335 would amount to a major abdication of the responsibility that the Constitution confers on Congress and that the people have entrusted to us as Members of Congress. That is not a road we should take. That is not a road the people want us to take. I urge this Committee to reject S. 2335 as forcefully as they know how.

APPENDIX 14

Statement Submitted by Hon. Robert L. Livingston, a Representative in Congress From the State of Louisiana

MR. CHAIRMAN, MEMBERS OF THE HOUSE FOREIGN AFFAIRS COMMITTEE, THANK YOU FOR GIVING ME THIS OPPORTUNITY TO TESTIFY ABOUT THE ANTI-TERRORISM ACT OF 1986. I WOULD LIKE TO ASSOCIATE MYSELF WITH THE REMARKS OF MR. BARTON AND MR. HUNTER MY COSPONSORS ON THIS IMPORTANT PIECE OF LEGISLATION.

AS YOU KNOW, THIS BILL WOULD CARVE OUT AN EXCEPTION TO THE REQUIREMENTS OF THE 1973 WAR POWERS RESOLUTION, WHICH SET TIME LIMITS ON THE PRESIDENT'S USE OF FORCE AND MANDATE PRIOR CONSULTATION WITH CONGRESS, SOLELY FOR ACTS OF TERRORISM DIRECTED AGAINST UNITED STATES CITIZENS. I STRONGLY FEEL THAT THE PRESIDENT DOES NOT NEED TO BE SECOND GUESSED WHEN DEALING WITH A TERRORIST THREAT.

THE WAR POWERS RESOLUTION WAS ENACTED, OVER THE VETO OF THEN PRESIDENT NIXON, IN ORDER TO REQUIRE A PRESIDENT TO ADEQUATELY CONSULT WITH CONGRESS BEFORE UNDERTAKING CONVENTIONAL MILITARY ACTION, AND IF CONGRESS DOES NOT APPROVE OF THE ACTION, FORCE HIM TO WITHDRAW OUR FORCES FROM THE DANGER ZONE. BUT THIS IS THE 1980s, AND THINGS HAVE CHANGED DRAMATICALLY. ALTHOUGH WE STILL FACE CONVENTIONAL EXTERNAL THREATS, THE MORE IMMEDIATE PROBLEM IN THIS DECADE HAS BECOME TERRORISM. WE NEED TO WAKE UP AND REALIZE THAT WE ARE CURRENTLY ENGAGED IN AN UNCONVENTIONAL WAR AGAINST INTERNATIONAL TERRORISM. IN ORDER TO BE EFFECTIVE IN THIS FIGHT, WE NEED TO TAKE APPROPRIATE COUNTERMEASURES.

SOME MEMBERS OF THIS BODY HAVE SUGGESTED THAT WE NEED MORE RATHER THAN LESS CONSULTATION BEFORE THE PRESIDENT COMMITS OUR ARMED FORCES. YET, DEALING WITH TERRORISM REQUIRES A DIFFERENT RESPONSE BECAUSE OFTEN SURPRISE IS THE KEY TO PREVENTING OR RESPONDING TO TERRORIST ACTS.

WE ALL KNOW HOW WELL CONGRESS KEEPS SECRETS, BUT OFTEN IT IS NOT EVEN THE MEMBERS THEMSELVES WHO ARE AT FAULT. WITH THE INTENSE MEDIA SCRUTINY THAT WE FACE ON A DAILY BASIS, IT DOESN'T TAKE MUCH OF A CLUE TO NOTIFY THE PRESS THAT SOMETHING UNUSUAL IS ABOUT TO HAPPEN. AND, IF THE MEDIA KNOWS OR SUSPECTS THAT MILITARY ACTION IS ABOUT TO TAKE PLACE, YOU CAN BE SURE THAT OUR ADVERSARIES KNOW IT AS WELL. THIS PUTS MEMBERS OF OUR ARMED FORCES IN IMMEDIATE JEOPARDY.

IN 1973, CONGRESS COULD NOT FORESEE THAT THE THREAT OF TERRORISM WOULD BECOME SO SUBSTANTIAL. THE CURRENT VERSION OF THE WAR POWERS RESOLUTION WAS A PRODUCT OF OUR FEARS AT THE TIME, AND WE MUST REALIZE THAT IT DOES NOT FIT THE CHANGED CIRCUMSTANCES OF THE 1980s. THE TIME HAS COME TO MAKE CHANGES TO THIS RESOLUTION THAT WILL ENHANCE OUR SECURITY.

I REALIZE THAT PRESIDENTIAL CONSULTATIONS WITH CONGRESS ARE HELPFUL AND SHOULD BE UNDERTAKEN WHENEVER POSSIBLE, BUT THERE MAY BE TIMES WHEN ANTI-TERRORIST OPERATIONS ARE SO SENSITIVE AND DANGEROUS THAT IT IS IMPOSSIBLE TO REVEAL THEM IN ADVANCE. THE PRESIDENT IS CONSTITUTIONALLY MANDATED AS THE COMMANDER-IN-CHIEF, AND THE RESPONSIBILITY FOR THE SAFETY OF MEMBERS OF OUR ARMED FORCES IN IN HIS HANDS.

LET'S STOP SECOND GUESSING OUR COMMANDER-IN-CHIEF, AND GIVE HIM THE LATITUDE HE NEEDS TO DEAL WITH EMERGENCIES AS THEY ARISE. THIS BILL STILL REQUIRES CONGRESSIONAL NOTICE WITHIN 10 DAYS AFTER THE FACT; SURELY THAT'S ENOUGH.

APPENDIX 15

Statement Submitted by William Green Miller

THE NECESSITY FOR AND THE FEASIBILITY OF A CONGRESSIONAL COMMITTEE ON NATIONAL SECURITY: A CONGRESSIONAL PERSPECTIVE

Introduction

The most important national security issues of war and peace are decided by the President and his chief advisers without reference to the legislature. Congress has not had a meaningful role to play in the decisions made on the most crucial problems that face the United States ranging from the policy for the use of nuclear weapons, decisions to take United States forces into possible or actual hostilities ,and other actions which might place the nation at risk.

There is a strongly held view in the Congress and elsewhere in the country that the most important life and death policy decisions affecting the defense, foreign policy and security of the nation should not be made by one man, but whenever possible by both the Congress and the President through the full exercise of constitutional processes. Clearly the war-making power and any significant use of military, economic and diplomatic means to further our defense and foreign policies should not be exercised without full consultation with Congress and consideration of its advice. Ultimately, the President should not undertake such dangerous high risk actions on his own unless he has legislative support.

It is evident that the major national security policy decisions made since World War II have not been the result of this kind of joint constitutional process. On the contrary, the key decisions have been made by the President in the White House , principally in the National Security Council or its informal variants such as President Lyndon B. Johnson's "Tuesday Lunch Group."

The formal institutional focus of presidential national security decision making is the National Security Council. Even though crucial national security decisions may be made in other White House settings or with the advice of ad hoc groups, the National Security Council remains the place where most, if not all Presidential national security considerations take place and decisions are made.

If it is correct that the key national security issues of defense,war and peace should for practical political and constitutional reasons be the responsibility of both the Legislative and Executive branches,then it makes sense for Congress to take the steps necessary to achieve constitutional balance. For almost forty years,the Congress has not had a legislative counterpart to the National Security Council, but it is clear that Congress can and should act to create a committee to serve in such a role.

The purpose of a Congressional national security committee would be to serve as an effective and constitutionally appropriate legislative partner with the President and his chief advisers.It would have two functions:first, and most important, would be to work in close consultation with the president and his chief advisers on the crucial national security issues that come before the President and his inner circle for policy consideration and decision. The second is closely related to the first, namely, to function as the formal agent of the legislature as a whole on vital national security matters.

Congress throughout the post World War II period has been disposed to give the President the discretionary powers necessary to act effectively

and quickly when the United States is in grave danger. The experience of Vietnam and a number of other presidential actions that have put the United States to some degree at risk have resulted in restrictive legislation such as the War Powers Act, the Hughes-Ryan Amendment and the Intelligence Oversight Act. It is fair to say that at the present time, the majority view is that the President should have the discretionary authority to forestall attack. Further, there is still overwhelming support for the continued practice of delegating to the President the authority to move expeditiously in times of crisis or emergency. But there also is a substantial body who believe that the President should not be given the sole authority to put the nation avoidably at risk unless there first has been full consultation and a formal action by the Congress. The War Powers Resolution and the Intelligence Oversight Act are statutory expressions of the limits of delegation of authority.

The question then arises, if there are limits to delegation, and there is a requirement for consultation, what are those limits, and who should be consulted and how expeditious, useful and authoritative would such consultation be? In the period before the United States entered World War II, Franklin D. Roosevelt ordered the Navy to sink Nazi submarines without consulting Congress. The invasion of Cuba and the dispatch of military forces to Grenada and the Marines to Beirut were ordered without serious consultation with Congress. The authority to approve in advance the possible use of nuclear weapons should not be made by the President alone. The crux of the matter is whether a President may take an action on his own authority that could put the nation avoidably at risk . This paper will

explore the advisability of a Congressional national security committee composed of the leadership to serve as a counterpart to the President and his chief advisers.

National Security Activities Now Outside Congressional Purview

As an institutional matter the most important decisions made by the President in the National Security Council or in other high level White House decision-making groups are presently not subject to the purview of the Congress. Congress does not receive notification or copies of NSC decisions. It has not had formal access to NSC proceedings or records or other presidential orders or decisions except in connection with a few investitgations, the most notable being the Watergate inquiry, the investigations into allegations of illegality and improper behavior by the intelligence agencies of the United States conducted by the Church Committee in 1975-76, and a study on Iran policy in 1980. It is an unfortunate fact that in practice there has been no effective means of consultation between the Congress and the President and the NSC or other key White House policy-making and decision-making groups, even though the decisions made there concern war and peace and the very existence of the nation.

The National Security Council Is The Most Important Decision-Making Body

The use of the NSC since it was established in 1947 by one of the provisions of the National Security Act (Section 101) has varied according to the style and preferences of the President in office, but the NSC has grown steadily over the years in power and influence. The NSC is the key coordinating body for the President in carrying out national security

decisions. In all significant respects it is the nerve center for all national security activities. It is now, and has been for several decades, the place where most, if not all national security decisions are made, as well as the institutional locus where policy alternatives are discussed with or for the President.

The gravity of the decisions that are made cannot be minimized. At the top of the scale of importance are decisions about policy concerning the strategic issues including first use of nuclear weapons, down the scale to a whole range of conventional force issues such as the dispatch of U.S. forces on rescue missions or the supply of urgently needed equipment. Many of the decisions made in the NSC and in other high level groups of Cabinet officers and key adivsers (such as L.B.J.'s "Tuesday Lunch group"), indeed most, are not of great urgency. They are by any definition long range. But some of the decisions are in response to immediate crises such as the seven day Cuba missile crisis, the decision to send Marines into Beirut, or policy governing the use of nuclear weapons. Of the greatest concern are those decisions which by their nature place the nation at risk, creating a situation of potential danger where one did not exist before.

The NSC Adviser in the past several administrations has been almost as important as the Secretaries of State or Defense. In the case of Kissinger and Brzezinski the NSC adviser has on occasion been the most important aide to the President. The NSC staff has a correspondingly dominant role in the bureaucracy.

Congress Does Not Receive Notice Of NSC Or Other Presidential Decisions

As a decision-making body, as a place for policy consideration, as

coordinating body for broad national security policy implementation, the NSC and its informal variants since 1947 have been of the greatest importance. Yet the record of its decisions--many of which are of the most profound gravity such as nuclear strategy, when to use nuclear weapons, decisions involving the lives of Americans and the expenditure of vast funds and resources--these decisions for the most part have not been made available to the Congress. In fact, White House lawyers in successive administrations of both parties have maintained that all Presidential papers including NSC papers are the property of the President, and that neither the Congress nor the public has any right to those papers.

Reluctance To Provide NSC Records And The Intelligence Exception

In practice, particularly in recent years, copies of NSC papers have been given, loaned or otherwise obtained by the Congress. Examples of every type of NSC document from every administration are now in the files of the relevent committees, particularly the intelligence oversight committees. But no committee of the Congress or the Congress as a whole has had access to NSC decisions or papers or other presidential decision documents as a matter of right or practice on a comprehensive, systematic or timely basis. The one exception is the statutory requirement placed upon the President by PL 96-450, October 14, 1980, Section 501 to report in writing all presidential decisions or findings on covert action and to keep the two intelligence oversight committees of the Congress "fully and currently informed" of all intelligence activities. Since all major policy decisions on covert activities and intelligence activities are made by the President in the NSC context, reports on the substance of these decisions

and relevent activities have been given to the intelligence oversight committees.

Covert actions and other intelligence activities are the most sensitive and fragile functions engaged in by the United States government. They involve the security of the nation, often in the most essential, even vital ways. They affect its real power, its international reputation, and the efficacy of its foreign and defence policies. Since 1976, the intelligence committees of both Houses have in fact been fully informed of all intelligence activities that might affect the essential security of the United States with very few exceptions. And in these few exceptional cases, the withholding of information was quickly discovered and the decision not to provide information was hotly contested and taken at great political cost. Based on the past ten years' experience, the House and Senate intelligence committees have worked out effective, useful relationships with the Executive branch on oversight of the full range of intelligence activities. These practices and procedures would be of direct relevence to a national security committee. In fact, this relationship between the intelligence oversight committees of both House of the Congress with the Executive branch including the NSC, provides the most compelling evidence to believe that a national security committee could also function in efficient, secure ways enabling the most important decisions affecting the national security of the country to be made in accord with full constitutional processes.

The Intent Of Congress In Creating The NSC

The intent of Congress as expressed in the Declaration of Policy

section of the National Security Act (Section 2, 50 U.S.C. 401) is "to provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies and functions of the government relating to the national security. . ."

In creating the National Security Council, Section 101 (50 U.S.C. 402) provides that "the function of the Council shall be to advise the President with respect to the integration of domestic, foreign and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security."

Section 101.(b) states:

(b) In addition to performing such other functions as the President may direct, for the purpose of most effectively coordinating the policies and functions of the departments and agencies of the Government relating to the national security, it shall, subject to the direction of the President, be the duty of the Council--

(1) to assess and appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purpose of making recommendations to the President in connection therewith; and

(2) to consider policies on matters of common interest to the departments and agencies of the Government concerned with the national security, and to make recommendations to the President

in connection therewith.

Congress Not Now A Part Of Crucial National Security Considerations

Congress in creating the National Security Council did not intend to exclude itself from national security matters; on the contrary, its purpose, as the legislative history of the National Security Act of 1947 makes abundantly clear, was to enable the government to function more effectively in the area of foreign policy and defense. The Armed Services committees of both Houses of Congress held hearings on the bill and worked with the Executive branch on the final language of the Act. Since Congress created the National Security Council to enable the Executive to function more effectively in national security matters, it can also by its own action create a committee to be available for consultation on key national security decisions, to be aware generally of the National Security Council's activities, and to have access to Presidential national security decisions, studies and deliberations insofar as those decisions, studies and deliberations affect the national security.

Should Congress Be Involved?

As a practical matter the key decisions of the government on national security matters up to this point have been made in the NSC, and its studies, reports and recommendations shape policy decisions. The question then arises, if the key decisions are made in the NSC or its informal sub-groups would the people and the government of the United States be better served if Congress was a part of that process, was advised and consulted and in turn was able to give its advice on the policies being considered, and had access on a full and current basis to the

decisions, documents and substantive reports that helped shape the decisions. It is impossible to know whether wiser, more successful policies would have been pursued if Congress had been involved; but in the light of Vietnam when there was a breakdown of national consensus of great consequences, Congressional involvement would have been a help.

From the time of the founding of the Republic in the late eighteenth century, a view has been expressed by those who believe that the Executive should not be hampered by the Legislature, particularly in foreign policy and defense matters. This "king's party" view tries to make the point that the Legislature is incompetent to deal with such urgent, complex matters as foreign policy and defense. But rarely, if ever, has an administration come into office with cabinet officers and other high appointed officials who have as much direct experience with foreign policy and defense issues and first hand acquaintance with the world's leaders as the senior members of the House and the Senate. Indeed, the Senate has been the training ground for presidential leadership in foreign policy and defense.

Far from obstructing presidential freedom of action in matters of national security, the historical record provides ample evidence that the Congress is usually disposed to support presidential initiatives. There is a belief that a bi-partisan foreign policy strongly supported by both Houses and the country as a whole is desirable. Dissent and criticism usually are the consequence of a failure to consult, inform and to receive advice and consent before actions are taken. The breakdown of consensus and a bi-partisan foreign policy occurred when a President decided to

direct foreign policy and defense on his own, despite Congressional and popular objections.

From a constitutional point of view, Congress has a right to insist upon consultation and to receive all relevent information concerning Presidential decisions made in the NSC and other key Executive branch policy-making groups. There is nothing in the substance of National Security Council proceedings, decisions, or the reports, studies and recommendations of the departments and agencies of the Executive branch that cannot be shared with Congress. On the contrary, these proceedings, decisions, reports, studies and recommendations would serve to assist the Congress in its necessary consideration of legislation that affects the national security. The Executive branch, in turn, would benefit from the different perspectives that come from the Congress and the wealth of experience and expertise that is available in the Legislature.

Arguments For Keeping Congress Out Of The Process

One argument that has been often expressed about Presidential considerations and decisions made in the context of the National Security Council is that they are protected by a kind of special privilege sometimes called "Executive Privilege," which means that the substance of advice and the nature of give and take in the proceedings are considered private. There is no objection to the idea that the President needs a "sounding board," and he should be able to test his thoughts in a private confidential way with close confidants. The NSC and its ad hoc and informal variants have been sheltered in the past by arguments of this kind. But it is clear that the NSC is not a quiet corner for private musings; on the contrary, it

is the place where the most important national security decisions are made. There is understanding and sympathy for the need of Presidents to be able to test ideas, ruminate and confide. No serious proposals have contended that the President does not need privacy of that kind. But the work of the NSC, and certainly NSC decisions, do not by any definition fall into the category of private confidences.

A number of recurring arguments have been used in the past as reasons for reserving national security information to the Executive branch. Are there, for example, national security secrets that because of their sensitivity cannot be shared with the Congress? A somewhat similar question arose during the formative period of the Senate Select Committee On Intelligence. The most contentious legislative issue between the Executive branch and the Church Committee in the years 1975-76 was whether the Congress had the right to intelligence information, and if so, to what degree and under what conditons. This issue was discussed almost daily with the Ford and Carter administrations. Both President Carter and Ford were directly involved, as were the vice-presidents, four directors of Central Intelligence, three attorneys general and legions of lesser officials and lawyers.

The Congressional Views On Access To Information

The Senate Intelligence Committee based its claim to any and all information concerning the intelligence activities of the United States on its need to have the information in order to carry out its legislative duties in these areas. Since the information generated by the intelligence agencies was paid for by funds appropriated by the Congress, Congress has

a right to such information and the right, indeed the duty, to monitor the activities of the intelligence agencies in order to determine whether public funds were being properly spent in accord with legislative intent. The Senate view became law in 1978.

The language of the Congressional oversight provision of the National Security Act of 1947 (50 U.S.C. 413) provides that the intelligence committees of the Congress shall be

> fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated activity. . .(Section 501.(a)(1)

The Precedent Of The Joint Committee On Atomic Energy

This right of access on the part of the intelligence oversight committees to any and all information is based on the language contained in the Atomic Energy Act of 1946 which accorded to the Joint Committee On Atomic Energy a right to any and all information pertaining to nuclear energy and related issues. Section 202 of that Act states that it shall be the duty of the relevent departments and agencies to keep the Joint Committee "fully and currently informed." The provision of information in the degree the Committee desired and when the Committee desired it was satisfactory according to the testimony of members who served throughout that Committee's existence.

The existence of the Joint Committee On Atomic Energy at the time the intelligence oversight committees were being established was crucial.

The precedent of the Joint Committee and the powerful support of key Senators who had served on that Committee made the effort to obtain similar authority for the intelligence oversight committees a much easier task. The record of access, of security, and of cooperation with the Executive branch on the part of the Joint Committee On Atomic Energy was viewed by most parties as a model of excellence.

The Security Argument

Since it could not be credibly argued that national security secrets could not be given because they had never before been provided, the next fall back was security. The argument was pressed that by its nature Congress was an open institution and could not maintain the security necessary to keep required secrecy. By clear implication, the views were put forward that the Congress cannot be trusted to keep secrets because of the temptations of partisan politics, a natural desire to use the publicity value of sensational exotic exposes, or because sound security practices required a kind of institutional discipline that was alien to Congress.

The political pressures, the desire for publicity, the lack of practiced discipline in security matters are all vulnerabilities of the higher reaches of the White House and all Executive branch departments and agencies as well as of Congress. For example, in 1976 it was shown that many more leaks had come from the White House and the Executive branch than from Congress. Both the Director of CIA and the President attested, to their regret, that the White House and the departments and agencies including the CIA had more serious security breaches than the Congress. Indeed,

they praised the Senate Intelligence Committee for its tight security.

Both the Church Committee and successor Oversight Committee worked closely with the White House, the FBI and the intelligence agencies to develop sound security practices and procedures. For example, a requirement for staff employment is a security clearance. In addition to investigation done by the Committee itself, the FBI conducts a security investigation similar to investigations done for prespective employees in the intelligence agencies or NSC staff. A full field check is done by all other intelligence agencies as well. Only after these steps have been taken will the Committee consider hiring a straff member. The offices, safes, secure telephones, file systems and conference rooms all meet security standards established by security experts in the FBI, CIA and other intelligence agencies. There are regular inspections of these facilities and procedures to be sure the security is of the highest possible standard. A large proportion of the staff of the Intelligence Committee has served in the intelligence agencies and related departments and agencies and is familiar with the requirements of necessary security. Finally, the security staff of the Committee are experienced security officers with considerable relevent service in the line intelligence agencies.

The Need To Know And Sources And Methods

There were other more difficult security issues that faced the Church Committee beyond clearances or physical security. They centered on "the need to know," so called "sources and methods" and deep-rooted institutional loyalties.

First, the concept of the "need to know." From the point of view of the intelligence agencies, very few operatives or analysts had a need to know anything beyond their areas of responsibility. Only a few policy makers at the top needed comprehensive knowledge, or complete access to all available information. Indeed, even within particular areas, there is a hierarchy of knowledge, or in the terminology of the intelligence community a series of increasingly restricted "compartments." The most sensitive compartments are reserved for the smallest possible group of policy makers, because of the fragility of the sources of information, or in some cases, the political risks involved.

For the Congress, its need to know results conceptually in an opposite approach. For policy making, for legislative purposes, it is important to know as much as possible from as many sources and view points as possible. If information is to be "compartmented" it is because it is not relevent to the policy-making function. For example, in most cases, the names of agents who acquire information or of the exact technical means by which some information has been obtained are not relevent to policy considerations.

Over a period of years a reasonable formula of compartmentalization satisfactory to both the needs of protecting sources and methods of the intelligence agencies and the comprehensive needs of a policy-making and oversight body have been developed. In essence, the oversight committee is willing to limit access on fragile sources and methods to a small group of members and staff on a rotating basis, while reserving the right to all information whever it deems it necessary. In no case has the Committee

waived the requirement that a few of its members and staff always be fully and currently informed.

Executive Privilege And Inherent Powers

Are there any areas of national security information that are inherently the province of the Executive branch alone or the President and a few advisers? This issue was vigorously contested. In the debate that took place between the Senate Intelligence Committee and the White House between 1975-78, it was concluded that there are no kinds of national security information that cannot, as a constitutional matter, be shared by both the Executive and Legislative branches. As one example, in discussions between Staff Director William G. Miller and White House Council Lloyd N. Cutler a series of hypothetical cases were drawn up in an attempt to clarify boundaries, if any, between information of an intelligence or national security nature that could be reserved to the Executive or the President alone. No cases in the historical record could be found to fit a category of exclusion or executive privilege.

The "Mole In Ruritania" Exception

One hypothetical was conceded by both sides as a valid possibility, namely the so-called "mole in Ruritania" example. In this case, a source has suddenly become known to the President himself by a means external to the U.S. known to the President alone. This source holds the key to the survival of the U.S., and because of a complicated series of circumstances if the President informs anyone else, the act itself would destroy both the source and the U.S. In this extreme improbable case, it was agreed the President had a constitutional duty not to tell anyone else, Congress or

otherwise. But if the circle of knowledge could extend with safety by one or two beyond the President, the exclusion of Congress no longer applies. It was agreed that there was no valid way of institutionally conferring more loyalty or security on a White House aide than on a committee chairman. Constitutionally, in this case, it was argued, once the circle was widened beyond the President himself, the Legislature had as much right to the information as the Executive branch.

The Need To Take Action To Meet Sudden Crises

It has been claimed that there is often a necessity to take action quickly and that this urgency prevents consultation with Congress on national security issues. This assertion has been used to maintain that vital national security matters cannot wait for Congressional deliberations because the urgency that decisions be made quickly would make such processes impossible; indeed that delay would endanger the security of the nation. Although it is of course conceivable, the historical record shows no cases where this has been the circumstance. Even in sudden events like the seizure of the Mayaguez, the shooting down of KAL 007, or the rescue of Americans in Grenada, there was sufficient time available for extensive consultation with Congress before decisions were made. In fact, the Mayaguez rescue might have been accomplished without loss of life if there had been more deliberation using the better information which later became available; in the case of Grenada, the political crisis on that small island had been brewing for several years, the Carter administration had consulted with Congress, and consultation by the Reagan administration would clearly have been desirable; in the KAL

007 instance, it was several days before the facts were even available.

It is clear, however, that the President could within his constitutional rights act without reference to Congress, if he believed not to act immediately would seriously endanger the security of the U.S. or certainly result in the death of Americans. The constitutionality of his actions would in these cases be measured by the results. Almost all, if not all issues that come before the President in the NSC or its informal variants for consideration, deliberation, or decision are not of this immediacy. The case usually cited as an example of an urgent matter, the Cuba Missile Crisis, extended over seven days and the roots of the crisis went back months and years before the event.

Consultation, of course, mans many things. There is an all too familiar kind of consultation which informs Congress at a point when the decision or action has already been taken. This kind of "consultation" is at best, a kind of record keeping.

There is a second type of consultation which could be likened to taking the temperature. Selected, usually sympathetic Senators or Congressmen are informed in a private way about the direction of administration policies. The purpose of "consultation" in these instances is to get advice on the likely reaction of Congress to policies or decisions that they had no part in determining.

Finally, there is full consultation which means fully discussing an issue with a microcosm of the Congress and seeking advice and reactions before a policy is decided. In most cases this means a committee. A good example of prior notification is the notice on covert action programs of

the CIA which is given to the intelligence committees of both Houses of Conagress. There have been a number of occasions when covert action programs have been modified or terminated as a result of this form of prior notification.

Section 3 of the War Powers Resolution calls for consultation with Congress "in every possible instance before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." While the statute is plain in its language that consultation shall take place, it has not worked. One reason for the failure to consult with Congress before the event may be the lack of an appropriate, secure, authoritative and representative leadership group or committee for the President to confer with. The absence of precise wording of the consultation provisions in Section 3 of the resolution indicating with whom in the Congress the President should consult has proven to be a serious shortcoming.

Compulsary Consultation

Congress can, however, compel consultation before an action may be taken. It can do this by language incorporated in the statute authorizing the creation or activities of an Executive branch entity. Good examples of this legislative path are, as indicated earlier, the consultative provisions written into the Atomic Energy Act of 1946 and the Intelligence Oversight Act (P.L. 96-450 October 14, 1980) which require full consultation of all activities within those committees' jurisdictions including prior notification of significant anticipated activities. In the case of

statutorily required consultation of any intelligence activities, prior notification while required is not linked to a requirement for approval by Congress of the anticipated action.

Senator Howard Baker, then a member of the Senate Select Committee On Intelligence, was instrumental in the formulation of the portion of the proviso that states

> Sec. 501.(a)(1)...the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity...

What was intended here was a procedure that would result in full, meaningful consultation before decisions were made, but not in a means to block a vital national security action through delay or inaction.

The nature of "full consultation" that was sought by the authors of this provision was neither a means to obstruct necessary action nor a prescription for sleepy consent or cooption. What was intended was the creation of an institutional process where the broad diversity of responsible American opinion as represented by the Congress could be aired on the major issues of intelligence policy. Thus far, this new institutional innovation for consultation has worked reasonably well.

It was also clear to the authors of this provision that the Congress could, in fact, act through a variety of means such as the exercise of the power of the purse to stop a proposed activity if it believed it necessary, but they recognized it would require a full exercise of the legislative process to do so. On the other hand, the President having consulted fully would be free to proceed if he believed it necessary. In the case of

disagreement, he would do so at his peril, knowing his action might be subject to a variety of forms of legislative actions.

A practical question that must be answered then is, can Congress or a committee of Congress be convened soon enough and in a small enough group for security purposes and yet be a representative enogh group to be able to meet with the President and his chief advisers to consult, advise and help lead in times of great urgency and national danger?

Will Congress Be Available In Time Of Crisis?

This problem was addressed in the Vietnam period when Mike Mansfield adopted two procedures. He first decided that as a technical matter Congress would never be out of session. When not formally in session it would be in recess subject to recall of the chair. In addition, he established an informal duty roster of the leadership. Further, he ordered the Secretary of the Senate to maintain a list of telephone numbers for each member so that they could be contacted at any time and brought back to Washington within twenty-four hours no matter where they were. As a practical matter, the leadership by the nature of its role is "always around," and would be available for consultation as readily as any Cabinet officer.

Another example would serve to illustrate the availability of Congress for crisis consultation. The Senate Intelligence Committee's first chairman, Daniel K. Inouye, made sure that he could be contacted by telephone, even when in Hawaii, within minutes. His successors have followed his example. It is clear, therefore, that the Congress can organize itself to meet, to discuss, consult, advise, or decide on urgent

issues. It is not much more difficult to assemble Congressional leadership than it is the membership of the NSC. Secure telephones, teleprinters, available aircraft and other forms of transport all serve to make it possible for a responsible Congressional committee to assemble quickly and confer on urgent national security issues.

Expedited Procedures For Action In Crisis Situations

Congress has the means through its own rule-making process to clear the decks at any time and set aside all other business to attend to urgent matters. The rules of each body have been tested by over two hundred years of experience. Changes in the rules, therefore, are generally very difficult to make and are usually the result of long debate and deliberation. The change in the "cloture" rule in the Senate from two-thirds to three-fifths was a long and difficult task. There are other ways to change the rules, for example by incorporating the desired changes in legislation. A good case in point is Section 8 of Senate Resolution 400 which created the Senate Intelligence Committee. It provides for a time certain for votes on vital intelligence matters such as the disclosure of classified material. In the case of the War Powers Resolution, which was passed by the Congress over President Nixon's veto, the time allowed for debate is restricted by statute, and a time certain for votes is prescribed. (See Section 6, entitled "Congressional Priority Procedures For Joint Resolution or Bill," attached as Appendix I.)

There are other ways to get action on vital matters that suddenly emerge. For example, under the rules of the Senate a request by two Senators is all that is needed to require the Presiding officer to close the

doors of the Senate chamber to consider confidential issues in closed session.

There is a wide range of choices to assure expedited action on national security issues. (See Appendix II for further examples of expedited procedures.) The simplest way is to incorporate the desired procedure in the enabling resolution creating the national security committee. Clearly if the leadership of both parties is involved in pressing a particular issue to debate or vote, the Congress will have little difficulty in adapting its agenda to meet a crisis.

A Congressional National Security Committee Would Be Composed Of The Leadership

Since the membership of the proposed national security committee or committees would consist of the majority and minority leaders, the chairman and ranking minority member of the Armed Services, Foreign Relations and Intelligence Committees, it is probable that the leadership of the national security committees would not encounter any serious procedural difficulties. The present Congressional leaders were chosen because of their abilities to gain a broad consensus on legislative initiatives. Congressional leaders, historically, have been chosen not only on the basis of seniority, but also because of the breadth of their experience and skill in international and domestic politics. The Congressional leadership is composed of members who because of their seniority and the power that comes with seniority are considered "barons," but some are also accorded "greybeard" or "wiseman " respect because of their considerable experience and effective leadership in a broad range of

domestic and national security issues. It is these factors of long experience, familiarity with recurring issues and direct acquaintance with the world's leadership as well as with the complexities of domestic politics that gives credence to the idea of a national security committee or committees in the Congress whose purpose would be to work in useful ways with the President and the National Security Council on the vital issues of national security.

The Problem Of Overlapping Jurisdictions

It has been argued that the present standing committes of the Congress, Armed Services, Foreign Relations, Intelligence and to a lesser extent several others, "cover" the national security area. Why then is there a need for yet another committee?

Similar arguments were raised when the National Security Council was being considered. The State Department, the Departments of the Army and Navy and other agencies maintained there was no need for another layer of government. It was to overcome the negative impact of competing narrow interests, and to coordinate, integrate, and direct the many entities in a single policy direction that the National Security Council was created. There are some analogies applicable to a Congressional national security committee because it would serve in part as the coordinator, integrator and "traffic cop" for the Congress in national security matters.

Further, a Congressional national security committee would not take away jurisdiction or erode the authority of the other standing committees. On the contrary, if the committee came into existence it would bring Congress for the first time into an area of crucial national importance

that had been outside Congressional purview. Because the membership of the national security committee would include the chairmen and ranking minority members of the key standing committees, the power of the disparate committees that fall under the rubric of national security like Armed Services and Foreign Relations would in fact be strengthened.

If the Congress created a national security committee or committees an important missing dimension would be added to the deliberative processes affeacting national security, namely, an authoritative, deeply experienced perspective on the domestic impact of a national security action. Cabinet officers are not nearly so expert on the vital matter of domestic politics as Congressional leaders.

The National Security Act sought to bring together the best advice on how to meet the respective demands of both internal and external policies. The statement of policy section of the Act says that explicitly:

> Sec. 101. The function of the Council shall be to advise the President with respect to the integration of domestic,foreign and military policies with respect to the national security. . .[Emphasis supplied.]

The work of both branches would benefit by the more informed consultation that would ensue if a national security committee or committees came into being.

The Role Of A National Security Committee Composed Of The Leadership: Consultation Not Oversight

Closely related to the jurisdictional issue is the very practical question of how much time and attention could reasonably be expected from a relatively small committee composed of the "natural"

Congressional leadership in national security, since it is obvious that the leaders of both parties and the chairmen and ranking minority members of the Armed Services, Foreign Relations and Intelligence Committees of both Houses are already burdened with other duties. The many duties of the Congressional leadership are somewhat analagous to those of the President and his chief cabinet officials and other national security advisers. Just as the President and the heads of departments and agencies must delegate the details of carrying out policies, so must the Congressional leadership rely on the standing committees to carry out the tasks of overseeing the actions of the Executive branch, and monitoring how the policies and monies authorized by Congress are being directed and spent.

It is clear that a national security committee composed of the Congressional leadership could not function in the manner of the standing committees. Such a committee could not devote the time and attention necessary for effective oversight. But the Congressional leadership is by habit and experience conditioned to direct issues that come to their attention requiring oversight, monitoring or investigation to the relevent standing committees.

The purpose of a committee composed of the Congressional leadership is to be available to meet with the President and his chief advisers on the really crucial matters that affect the United States, matters of defense and war and peace. The committee would not have to meet with the President and his chief advisers more than two or three times a year to consider long range policies and decisions. It would, of course, be

available immediately for consultation on sudden energent crises.

The standing committees of the Congress require large staffs to assist the members of the Armed Services, Foreign Relations and Intelligence Committees to prepare hearings, to review the complex operations, budgets and plans of the huge departments and agencies under their jurisdiction. A leadership national security committee would require only a small staff experienced with both Legislatiave and Executive branch national security activities and operations. This small experienced staff would work closely with the National Security Adviser and his staff and with the staffs of the relevent standing committees to enable effective close consultation to occur when crucial issues of national security emerge.

Crisis And Parliamentary Government

There have been many proposals suggested in recent years to create by Constitutional amendment of otherwise a parliamentary form of government. Various arguments have been put forward as to why a parliamentary form of government would be better suited to contemporary America than separate legislative and executive branches. Among the arguments is the desirability of being able to respond quickly, effectively and with an established national policitcal consensus on vital national security issues. The profound division between Presidents and the Congress on Vietnam is cited as an example of a crisis in national leadership that would have been averted or far more quickly resolved had there been a parliamentary system in effect.

There is little doubt that the issues raised by the proponents of a

60-907 O - 86 - 12

parliamentary system are valid and need to be addressed. At the same time, it is highly unlikely that there will be support for such a change by Constitutional amendment.

If the Congress moved to create a national security committee or committees composed of the bi-partisan leadership of the two Houses and the key committees to work with the President and his chief advisers, the United States would have in effect a kind of parliamentary leadership group for national security issues that truly reflects American national political leadership of both the Executive and Legislative branches.

Conclusion

The national importance of the issues considered and the decisions presently made by the President and his chief advisers without the involvement of Congress, decisions that could put the nation at risk when it was not before, ranging from going to nuclear war on a scale that could result in global conflagration to the disposition of U.S. forces and the expenditure of vast sums of money in furtherance of foreign policy or defense goals, are of such gravity that there are overwhelming reasons to create a Congressional counterpart. Among the most important of those reasons is the need for constitutional balance to enable the full diversity of American opinion to be expressed through the Congress in any decision as serious as war and peace.

On the basis of the experience of Congressional committees such as the Joint Atomic Energy Committee and the intelligence oversight committees of both Houses, a national security committee or committees composed of the leadership could be expected to address national security

issues effectively, with dispatch, and with appropriate confidentiality and security. It makes practical sense, and it is constitutionally appropriate to have the political leadership of both Executive and Legislative branches working together on a continuing basis.

If a national security committee or committees composed of the leadership were created, it should have the legislative powers accorded to any standing committee but should specifically include the following:

Such a committee or committees would require access to any and all reports, studies and papers produced by the National Security Council or any Department or Agency or any other group of the United States government related to national security decisions. Such information should be available "fully and currently" and as may be required given prior to anticipated activities with every reasonable precaution being taken to assure the protection of national security secrets and the confidentiality of deliberative processes.

There are many ways Congress could create a legislative counterpart to the National Security Council and its ad hoc informal variants. It could do so by statute, but this route would entail lengthy hearings and would encounter long delay. By far the simplest way would be for the leadership of both Houses to convene an ad hoc bi-partisan committee composed of the majority and minority leaders, the Chairman and ranking minority members of Armed Services, Foreign Relations and the Intelligence Committees to serve as a consultative body available to meet with the President and the NSC and any other key Executive branch national security decision-making group that might emerge. An ad hoc informal leadership

group could be created immediately without formal legislative action. When the leadership thought the time right, it would be appropriate, and in the long run more effective, for the Congress through the passage of identical resolutions to empower this national security leadership group with the legislative authorities the committee would need, by using the Constitutional power of the Congress to organize itself as it sees fit.

The overriding purpose of such a Congressional national security committee or committees is to strengthen the means of consultation between the President and the Congress on crucial national security matters of defense and war and peace in an effective and Constitutionally appropriate way. The need to do so has been evident for decades. Congress should act to meet this need.

Appendix I

Congressional Priority Procedures For Joint Resolution Or Bill

Sec. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas

and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

This is an example of an expedited procedure for a formal legislative action. The times can obviously be shorter or longer, but those set forth in Section 6 of the War Powers Resolution reflect a considered judgement about how long a reasonable period would be for a decision to be made by the Congress as a whole.

Consultation, on the other hand, is another matter. Consultation can take place in minutes, and at the most in hours. The key ingredients are in the case of national security decisions:

(1) an appropriate counterpart to the NSC

(2) the means to consult quickly and in secure circumstances.

As indicated elsewhere in this paper, a bi-partisan committee composed of the leadership of the Congress is the appropriate body with the authority and means to fully represent the Congress as a whole. Modern communication technology and security practices make rapid consultation feasible and practical.

APPENDIX 16

Letter to Chairman Fascell From the Friends Committee on National Legislation

May 15, 1986

Chairman Dante B. Fascell
Subcommittee on Arms Control,
International Security and Science
House Committee on Foreign Affairs
Washington, DC 20515

Re: Congressional War Powers

Dear Chairman Fascell:

We appreciate the opportunity to present our views on the subject of war powers, Libya, and state-sponsored terrorism. As you know, our Committee, though widely representative of Friends in the United States, does not purport to speak for all Friends.

Friends believe strongly not only in peace, reconciliation, and nonviolence, but also in the process of consensus, which involves broad participation in group decision-making. The value of that process does not disappear at times of crisis.

The war-making power is one of the most dangerous activitiesengaged in by any government. In the nuclear/space age it can involve, literally, the fate of the earth.

The framers of the U.S. Constitution recognized the significance of the war-making power and showed extraordinary wisdom by dividing it and requiring participation of both elected branches of the government in its exercise. The Constitution in Article II, Section 2, recognizes the President as commander-in-chief of the armed forces, but in Article I, Section 8, it gives Congress the power to declare war, raise and support armies, provide and maintain a navy, and provide for the militia.

Friends, historically and today, are believers in nonviolent resolution of disputes and are opponents of war. We have explicit views on the institution of war and its efficacy which may or may not be in accord with those of particular Members of Congress. But on the process of conaultation when the question of war and peace is being debated, we believe our view -- that there should be a broad public consensus on any war-making decisions -- is shared by many, many people in Congress and the public. Indeed, that view is built into the Constitutional framework through the requirement that the Congress itself vote to declare war.

Walter E. Schutt *Clerk, General Committee* Lilian Watford *Clerk, Executive Committee* E. Raymond Wilson *Executive Secretary Emeritus*
Edward F. Snyder *Executive Secretary* Ruth Flower *Legislative Secretary* Nancy L. Alexander *Legislative Secretary*
Alison D. Oldham *Legislative Action Coordinator* Selig Goodman *Development Secretary*
David M. Boynton *Associate Secretary for Administration*

Congress has not, in fact, declared war since 1941, although U.S. forces have engaged in a three-year war in Korea, a ten-year war in Indochina, and interventions in the Dominican Republic, Lebanon, and Grenada. The need to make decisions in minutes in a nuclear age, the lack of clearly defined opponents in guerrilla wars and "police" actions, and the problem of terrorism have led Congress to a virtual abdication of its explicit and formal power to "declare war."

In this new situation Congress, in accordance with its Constitutional powers, has attempted to construct a relevant role for itself by means of the 1973 War Powers Resolution. This calls for advance consultation with Congress when U.S. combat forces may be involved in hostilities, procedures for reporting to Congress when such hostilities begin, and a 60- to 90-day limitation on the time U.S. forces may remain in combat situations without specific Congressional approval.

We oppose any efforts to weaken the War Powers Resolution and further dilute Congress' responsibilities. Rather, the Resolution should be strengthened. In particular,

- o the requirement of prior consultation should be made more explicit and mandatory. It was a travesty to have the President's representative consulting with allies days before the Libyan bombing, but consulting with Members of Congress only after planes were already in the air.

- o it may also be advisable in the Resolution to identify the occupants of certain Congressional leadership positions who should be involved in this process. If the members of the House and Senate Intelligence Committee and non-elected members of the Executive Branch can be trusted with highly classified information, certainly Congressional leaders can be.

The Friends Committee on National Legislation specifically opposes H.R. 4611, by Representatives Barton, Livingston, and Hunter (S. 2335 by Senators Dole and Denton in the Senate), which would virtually repeal the War Powers Resolution and give the President a blank check to go to war throughout the world in the name of fighting terrorism.

Instead of abrogating the War Powers Resolution in order to fight terrorism, Congress should recognize that terrorism is another form of warfare, and that it is therefore **especially** appropriate to apply the war powers procedures when military action is contemplated. The political situations which give rise to terrorism usually develop over a period of time and give ample opportunity for preventive measures and for full and adequate consultation with Congress.

With regard to the general subject of terrorism -- which we recognize is not the main subject of these hearings -- we believe the present governmental approach is quite inadequate. Such efforts as passive security measures to fortify and limit access to various buildings are much too limited in scope to provide any lasting solutions. Military action, with or without Congressional consultation, not only fails to provide a lasting solution, but also is likely to be directly counterproductive.

As an organization committed to nonviolent resolution of conflicts, we are utterly opposed to the violence perpetrated by those regarded as "terrorists." But as observers who attempt to understand this issue from a perspective beyond a strictly national and partisan view, we must say that the current definition of the problem of terrorism is exceedingly limited, and the failure of U.S. policymakers to seek to understand the root causes of terrorism is very great. This unfortunate combination will, in our view, lead to greater violence, greater repression, and increasing pressure to take the war-making power away from Congress and centralize it in the Presidency.

We therefore urge the full Foreign Affairs Committee and other Congressional groups to undertake a serious study of the definition and the root causes of terrorism. A panicky response to a largely unexamined and ill-defined problem -- terrorism -- is not sufficient reason to overturn the procedures established for Congressional consideration of the gravest decision a nation can make.

Sincerely yours,

Edward F. Snyder

Edward F. Snyder

APPENDIX 17

PREPARED STATEMENT OF LEON LEIGHTON

THE WAR POWERS RESOLUTION:

ITS CONSULTATION MANDATE,

THE FAILURE TO IMPLEMENT IT IN LEBANON AND IN LIBYA;

ITS CONSTITUTIONALITY

THE WAR POWERS RESOLUTION

Congress enacted the War Powers Resolution over President Nixon's veto in November, 1973*. "The commitment of American military forces to Cambodia in 1970, and to Laos in 1971, without the consent or even the knowledge of Congress, showed that, like its predecessor, the present Administration believes the President may initiate foreign military actions without reference to the authority of Congress." (Sen. Rep. 93d Cong. No. 220, p. 5). "Many Members of Congress, including those who supported the (Cambodian invation of May 1970), were disturbed by the lack of prior consultation with Congress and the near crisis in relations between the executive and legislative branches which the incident occasioned" (H. Rep. No. 93 - 487, reprinted in "The War Powers Resolution", (Dec. 1983 ed.)**, p. 20.

Accordingly, the Resolution contains the following Congressional declaration of Purpose and Policy in Sec. 2a:

> "It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."

*The full text of his veto message is set forth in Appendix A hereto.

**Hereinafter cited as "WPR".

The House Committee Report said:

> "...(T)he Committee was sensitive to and cognizant of the President's right to defend the Nation against attack, without prior congressional authorization, in extreme circumstances such as a nuclear missile attack or direct invasion... (H)owever, it became increasingly evident that the problem did not center on such extraordinary circumstances. Rather, the main difficulty involved the commitment of U.S. military forces exclusively by the President (purportedly under his authority as Commander-in-Chief) without congressional approval or adequate consultation with the Congress" (WPR at 21). (emphasis added).

The Senate Committee Report said:

> "No responsible citizen questions the right -- or even the duty -- of the President to take immediate action against a sudden attack, or imminent threat of an attack, upon the United States or its armed forces. What the Committee does contest is that expansive view of Executive prerogative which holds that the President may use the armed forces at will, even in conditions falling short of a genuine national emergency, and that he may sustain that use for as long as he, and he alone, sees fit. Such unrestricted Presidential control of the armed forces is neither necessary or wise in our nuclear age, reconcilable with the Constitution, nor tolerable in a free society." (Sen. Rep., p. 9).

To effectuate the foregoing objectives, the War Powers Resolution requires that the President shall consult with Congress before introducing United States Armed Forces into hostilities or imminently hostile situations (sec. 3); and shall send a written report to the Congress within 48 hours after such introduction has been made (Sec. 4a). Termination of such use is mandated within 60 days after the report "unless the Congress has declared war or has enacted a specific authorization for such use of United States Armed Forces" (Sec. 5b).

Sec. 3 of the Resolution provides:

> "The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations."

The House Committee Report said:

> "A considerable amount of attention was given to the definition of consultation. Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available." (WPR at 23, emphasis in original).

"To 'consult' is, as Webster states, 'to seek the opinion or advice of another; to take counsel; to deliberate together; to confer'" (Garman v. Metropolitan Life Ins. Co., 175 F. 2d 24, 27 (3d Cir. 1949) (footnote omitted).

It has been recognized that such a consultation cannot be effectively conducted with 535 members of Congress. Aside from the problem of "leaks", meaningful discussion cannot take place in an amphitheatre.

The consultation mandate was not adequately implemented in Libya or in Lebanon. Therefore S.J.Res. 340 has been introduced, amending the War Powers Resolution to establish a permanent consultative body to consult with the President periodically.

The consultative group would consist of 18 members: the Speaker of the House, the President pro tempore of the Senate; and from each house: the majority and minority leaders, and the chairmen and ranking minority members of the Committees on Foreign Affairs and Foreign Relations, Armed Services, and Intelligence. (Cong. Rec. - Senate, May 8, 1986, p. 5598). The present group in these positions "has a combined total of 415 years of experience at the national level of our government ..., an average of 23 years per member", not including military service (Atwood statement, p. 17).

The President would benefit from the opinions and advice of these experienced legislators. "...(G)enuine consultation with Congress seems hardly to be an onerous restriction when one bears in mind the need for bi-partisan support and national unity" (Cox statement, pp. 5-6).

A group of this caliber and rank can be trusted not to leak secrets. They have had access on many occasions to military and intelligence secrets (Cong. Rec. - Senate, May 8, 1986, p. 5597). It would not seek to be informed in minute detail as to the specific times, places, or methods of introducing armed forces into hostilities, which must be decided by the Commander-in-Chief as a military determination. They would be consulted

on the policy decision as to whether armed forces should be introduced into a particular country.

Some members of Congress may object to being excluded from these consultations. But consultation with the above-described extremely well qualified representatives is better than no consultation at all. If these representatives fail to reflect accurately the views of the Congress, they can be replaced by others who do.

All of the Presidents since its enactment have consistently asserted that they are not required to obey the Resolution because it interferes with their constitutional powers, especially their position as Commander-in-Chief. This memorandum will show that the constitutionality of the Resolution is conclusively established by the decisions of the Supreme Court in _Little_ v. _Barreme_ during the Napoleonic wars; in the _Prize Cases_ during the Civil War, and in the _Steel Seizure Case_ during the Korean War; and by the unequivocal statements of all of the Founders who expressed their views on the subject.

INADEQUATE IMPLEMENTATION OF THE CONSULTATION MANDATE

A. Lebanon

United States Marines were introduced into Lebanon for the second time as part of a Multinational Force in September 1982, after the murder of President Bashir Gemayal, and the massacres in the Sabra and Shatila Palestinian camps (Sen. Rep. No. 98-242, p. 2). On October 23, 1983, their Headquarters Building at Beirut International Airport was destroyed by a terrorist bomb. "This catastrophic attack took the lives of 241 U.S. military personnel and wounded over 100 others" (Long Report, dated December 1983,* p. 32).

The Report says:

> (a) "The Commission concludes that U.S. decisions as regards Lebanon taken over the past fifteen months have been, to a large degree, characterized by an emphasis on military options and the expansion of the U.S. military role, notwithstanding the fact that the conditions upon which the security of the USMNF were based continued to deteriorate as progress toward a diplomatic solution slowed. The Commission further concludes that these decisions may have been taken without clear recognition that these initial conditions had dramatically changed and that the expansion of our military involvement in Lebanon greatly increased the risk to, and adversely impacted upon the security of, the United States Multinational Force." (p. 134, emphasis added).

*Report by Commission appointed by the Secretary of Defense, consisting of Adm. Robert L.J. Long, USN (Ret.), Chairman; Hon. Robert J. Murray; Lieutenant General Lawrence F. Snowden, USMC (Ret.); Lieutenant General Eugene F. Tighe, Jr., USAF (Ret.); and Lieutenant General Joseph T. Palastra, Jr., USA.

1. Introduction of United States Armed Forces into Lebanon

On September 21, 1982, President Reagan announced that United States Marines would return to Lebanon as part of an international force (Sen. Rep., p. 2). This was pursuant to an agreement with the Lebanese Government, which had requested that several nations "contribute forces to serve as a temporary Multinational Force...(whose presence) would facilitate the restoration of Lebanese Government sovereignty and authority over the Beirut area" (Agreement reprinted in WPR, at 74-76; see Report, at 62-63).

On September 24, Senators Percy and Pell wrote to the President, "recommending that the reintroduction of U.S. troops be reported under Section 4(a) (1)" (Sen. Rep., p.2). On September 29, President Reagan provided a report "consistent with the War Powers Resolution". It said:

> "The American force will not engage in combat. It may, however exercise the right of self-defense and will be equipped accordingly...
>
> * * *
>
> "I want to emphasize that...there is no intention or expectation that the U.S. Armed Forces will become involved in hostilities. They are in Lebanon at the formal request of the Government of Lebanon, and our agreement with the Government of Lebanon expressly rules out any combat responsibilities for the U.S. forces." (WPR at 62, emphasis added).

A House Committee Report said:

> "It would have been preferable if the President

> had filed a section 4 (1) report at the time the marines were deployed in September 1982. Such deployment was regarded by many congressional leaders as imminent involvement in hostilities and such a Presidential report would have afforded Congress an opportunity to exercise its judgment on this crucial matter" (H. Rep., 98-385, p. 4).

On December 15, 1982, 14 members of the Senate Foreign Relations Committee "wrote to the President to say they 'would expect Congress to be involved at the earliest possible stage... and that formal congressional authorization would be sought before undertaking long-term or expanded commitments or extending indefinitely the present level of operations'" (Sen. Rep., p. 2).

"Initially, the USMNF was warmly welcomed by the local populace. The environment was essentially benign and continued that way into the spring of 1983" (Long Report, p. 3). However, "(t)he destruction of the U.S. Embassy in Beirut on 18 April (1983) was indicative of the extent of the deterioration of the political/military situation in Lebanon by the spring of 1983. That tragic event also signaled the magnitude of the terrorist threat to the U.S. presence. A light truck detonated, killing over 60 people (including 17 Americans) and destroying a sizable portion of the building." (ibid, pp. 39-40).

2. The Lebanon Emergency Assistance Act of 1983

The Lebanon Emergency Assistance Act was passed by the Senate on May 20, 1983, by the House on June 1, and was

signed by the President on June 27 (Sen. Rep., at 2). Concerned about the rapidly deteriorating situation, and the increasing danger to the Marines, both houses insisted on writing into the Act the mandate that "(T)he President shall obtain statutory authorization from the Congress with respect to <u>any substantial expansion in the number or role in Lebanon</u> of United States Armed Forces" (Sec. 4(a), (emphasis added).

The Senate Committee Report said:

> "However, during the Committee's hearing on September 21 with Secretary of State Shultz, some question arose as to whether the Reagan Administration felt constrained by this provision.
>
> "Senator SARBANES.* * * Is it the Administration's position that what they need to do is consult with the Congress, or that they need to obtain an authorization from the Congress, that they could not expand the number or role without a specific Congressional authorization?
>
> "Secretary SHULTZ. I think the President, or perhaps any of you if you were President, thinking about your role, your Constitutional role as Commander in Chief, would be very reluctant to tie your hands and say that you could only order U.S. forces to do something or other after the Congress had authorized it.
>
> "Senator SARBANES. So it is your position, then, that you could substantially expand them without a Congressional authorization?
>
> "Secretary SHULTZ. The Constitutional reservation goes to the President's role as Commander in Chief, and therefore to his capacity to be in charge of the deployment of the armed forces of the United States. I have no doubt that he will continue to assert that role.
>
> The Committee is concerned that Secretary of State Shultz seemed reluctant to accept the need

for an authorization to expand substantially the number or role of U.S. forces in Lebanon as required by law. That provision was adopted after very careful deliberation by this Committee and on the basis of very clear assurances by the Reagan Administration that it would seek an authorization for that purpose... The following statement by Congressman Hamilton during the final debate on June 1 on a House-Senate compromise version of the bill, described the congressional interpretation of this provision:

"If possible, the President should obtain authorization from the Congress before any significant change is made in the size or role of the U.S. forces in Lebanon...(C)ongressional action should be obtained at the earliest possible time. In any case, the Congress expects full consultations by the executive branch with the Congress in a timely fashion should any change be contemplated in the size or role of U.S. forces in Lebanon, including any change in conjunction with the creation of a new peacekeeping force." (pp. 12-13, emphasis added).

3. The Events in August and September 1983

On August 10 and 11, 1983, an estimated thirty-five rounds of mortar and rocket fire landed on USMNF positions, wounding one Marine. On August 28, the USMNF returned fire for the first time (Long Rep., p. 31). "On August 29, fighting erupted again. Marine positions came under mortar, rocket, and small-arms fire, with the result that two Marines were killed and fourteen wounded. In addition, several

artillery rounds fell near the U.S.S. Iwo Jima (an amphibious support vessel lying offshore), with no resulting damage or injuries" (WPR, at 65).

On September 5, a Druze attack routed the Christian Lebanese Armed Forces, obliging the LAF to occupy Suq-Al-Gharb, to avoid conceding all of the high ground overlooking Beirut International Airport to the Druze. "USMNF positions were subjected to constant indirect fire attacks; consequently, counter-battery fire based on target acquisition radar data was employed. F-14 tactical airborne reconnaissance/DoD (TARPS) missions were conducted for the first time on 7 September. On 8 September, naval gunfire from offshore destroyers was employed for the first time in defense of the USMNF" (Long Report, pp., 31-32, emphasis added).

> "On 12 September 1983, the U.S. National Command Authorities (NCA) determined that the successful defense of Suq-Al-Gharb was essential to the safety of the USMNF. On 14 September, an emergency ammunition resupply to the LAF was instituted. On 19 September, Navy destroyers provided gunfire support of the LAF defenders at Suq-Al-Gharb. The battleship USS NEW JERSEY arrived in Lebanese waters on 25 September. (Report, p. 32, emphasis added).

The Commission said:

> "By the end of September 1983, the situation in Lebanon had changed to the extent that not one of the initial conditions upon which the mission statement was premised was still valid. The environment clearly was hostile. The assurances the Government of Lebanon had obtained from the various factions were obviously no longer operative

> as attacks on the USMNF came primarily from extralegal militias. Although USMNF actions could properly be classified as self-defense and not 'engaging in combat', the environment could no longer be characterized as peaceful. The image of the USMNF, in the eyes of the factional militias, had become pro-Israel, pro-Phalange, and anti-Muslim. After the USMNF engaged in direct fire support of the LAF, a significant portion of the Lebanese populace no longer considered the USMNF a neutral force." (Report, pp. 40-41, emphasis added).

It was obvious, by the time of the attack on Suq-Al-Gharb, that there had been a "substantial expansion in the number or role" of the United States Armed Forces in Lebanon. The 1200 Marines were being supported by navy destroyers and an amphibious support vessel lying offshore; and it was found necessary to send in the battleship New Jersey not long thereafter. The Long Committee concluded that "U.S. decisions as regards Lebanon taken over the past fifteen months have been, to a large degree, characterized by an emphasis on military options and the expansion of the U.S. military role" (p. 6, supra).

The Lebanon Emergency Assistance Act required that statutory authorization be obtained before such expansion be effectuated. This was not done. And Committee documents do not disclose any consultations on the subject with congressional representatives until September 20, after the attack on Suq-Al-Gharb. The Long Commission said in regard to that attack:

"A direct cause and effect linkage between Suq-Al-Gharb and the terrorist bombing on 23 October 1983, cannot be determined. The views of the senior civilian and military officials interviewed by the Commission varied widely on this issue... The prevalent view within the USCINCEUR chain of command, however, is that there was some linkage between the two events. Whether or not there was a direct connection between Suq-Al-Gharb and the increase in terrorist attacks on the USMNF, the public statements of factional leaders confirmed that a portion of the Lebanese populace no longer considered the USMNF neutral." (Report p. 42, emphasis added).

4. The Multinational Force in Lebanon Resolution

"On September 20, following negotiations with the White House and House Leaders, Senators Baker and Pell introduced S.J. Res. 166. A companion measure was introduced in the House" (Sen. Rep., p. 3).

This measure (subsequently replaced by S.J. Res. 159) provided:

> "The Congress intends this joint resolution to constitute the necessary specific statutory authorization under the War Powers Resolution for continued participation by United States Armed Forces in the Multinational Force in Lebanon" (Sec. 2c).
>
> "The participation of United States Armed Forces in the Multinational Force in Lebanon shall be authorized for purposes of the War Powers Resolution until the end of the eighteen-month period (from October 12, 1983) unless the Congress extends such authorization..." (Sec. 6).
>
> "Nothing in this joint resolution shall preclude the President from withdrawing United States Armed Forces participating in the Multinational Force in Lebanon if circumstances warrant, and nothing in this joint resolution shall preclude the Congress by joint resolution from directing such a withdrawal" (Sec. 7a).
>
> "Nothing in this joint resolution modifies, limits, or supersedes any provision of the War Powers Resolution or the requirement of section 4a of the Lebanon Emergency Assistance Act of 1983, relating to congressional authorization for any substantial expansion in the number or role of United States Armed Forces in Lebanon" (Sec. 7b).

On September 27, President Reagan wrote to

Chairman Zablocki:

> "While there were many things that contributed to (Sunday's) cease fire, it is my belief that your agreement to advance the compromise resolution on war powers - and the favorable action by the Foreign Affairs and Foreign Relations Committees - were particulary important. At a crucial point, your agreement and the supporting committee actions expressed a commitment to bipartisanship in U.S. foreign policy. Please accept my thanks

* * *

> "It would be my intention to seek Congressional authorization - as contemplated by the (Lebanon Emergency Assistance) Act - if circumstances require and (sic) substantial expansion in the number and role of U.S. Armed Forces in Lebanon" (WPR, at 82).

The Multinational Force in Lebanon Resolution (S.J. Res. 159) was passed by Congress on September 29, and was signed by the President on October 12. His statement accompanying the signing said:

> "I am grateful to those of both political parties who joined in the expression of resolve reflected by the enactment of this resolution and especially to the bipartisan leadership of Senate Majority Leader Baker, House Speaker O'Neill, House Foreign Affairs Committee Chairman Zablocki and Senate Foreign Relations Committe Chairman Percy.

* * *

> "Any differences we may have over institutional prerogatives will in no way diminish my intention to proceed in the manner outlined in my letter of Sept. 27, 1983, to achieve the important bipartisan goals reflected in this resolution". (Weekly Compilation of Presidential Documents, vol. 19, no. 416 (1983).

As the situation in Lebanon continued to deteriorate, many members of Congress expressed uneasiness about continuing the marine presence there for eighteen months. On February 15, 1984, - fourteen months short of the deadline, the President's report stated: "At the President's direction, the number of men ashore will be reduced in phases and redeployed to ships offshore, with a tentative goal of completion within 30 days...It is not intended that they remain until the United States achieves its long-term goals in Lebanon" (N.Y. Times, Dec. 16, 1984, p. A14, col. 5).

B. LIBYA

1. The Gulf of Sidra Exercises

On March 23, 1986, United States Forces in the Gulf of Sidra "began a peaceful exercise as part of a global Freedom of Navigation program by which the United States preserves its rights to use international waters and air space". On March 24, surface-to-air missiles were fired on a number of occasions from Libyan missile installations at United States aircraft operating over the high seas. United States aircraft returned this fire. On one subsequent occasion this aircraft fired on Libyan missile patrol boats well away from the Libyan coast, because the United States commander determined, in the light of the Libyan attacks on United States aircraft, that the vessel was hostile. No casualties

were suffered by United States forces, but the Libyan vessels were heavily damaged (Letter from President Reagan to Speaker O'Neill, dated March 26, 1986).

On March 24, Chairman Fascell wrote to the President as follows:

> "As demonstrated by today's reported attack, these deployments constituted from the outset a situation where imminent involvement in hostilities was a distinct possibility clearly indicated by the circumstances even prior to today's development.
>
> "Under the circumstances, prior consultation with Congress was required under the War Powers Act".

This communication was answered, not by the President himself, but by William L. Ball, III, Assistant to the President. He said:

> "First, our maneuvers in the Gulf have long been planned, as part of a global freedom-of-navigation program by which the United States preserves its rights to use international waters and airspace. Numerous similar prior operations did not provoke a response. We obviously cannot be deterred from exercising our rights by Qadhafi's legally baseless claims or by his threats".

These encounters in The Gulf of Sidra may well have accelerated Qadhafi's planned terrorist attacks against Americans, including the bombing of the Berlin disco. Such a result could be anticipated, in the light of his maniacal egomania, and his flightiness.

No one condones in the least his contemptible actions in supporting terrorism. Nevertheless, consultation

with legislative leaders, as proposed in S.J. Res. 340, might have considered how essential the naval exercises were in order to preserve "our rights on and over the high seas under international law"; and whether that action was worth taking against the risk of his not unanticipated response.

Judge Sofaer pointed that "we have been in the Gulf of Sidra area 16 times since 1981, and we have crossed Qadhafi's 'line of death' 7 times before the operation of last March" (Statement, p. 13). He never did answer the question as to whether that was not sufficient to reject Qadhafi's claim under international law, and how often it would be necessary for us to repeat the exercies in order to preserve our rights. President Reagan's report said:

> "U.S. forces will continue with their current exercises. We will not be deterred by Libyan attacks or threats from exercising our rights on and over the high seas under international law. If Libyan attacks do not cease, we will continue to take the measures necessary in the exercise of our right of self-defense to protect our forces".

Secondly, such a consultation could have considered the question as to whether our allies should have been invited to join in the exercises. While they have rejected our proposals for sanctions, they have as vital an interest as we have in vindicating the right to freedom of the seas, - particularly in the Eastern Mediterranean, which is much closer to them than

to us. If that had been done, Qadhafi's venom might have been diffused more widely, and might have deterred him from singling us out.

No one can say with certainty what such consultations would have accomplished, but they might have been helpful. In any event, they would have demonstrated appropriate obedience to the War Powers Resolution, and would have insured bipartisan support. Certainly there was adequate time for consultations before the exercises were initiated.

2. The Air Attacks on Tripoli and Benghazi

On April 19, 1986 "air and naval forces of the United States conducted simultaneous bombing strikes on headquarters, terrorist facilities and military installations that support Libyan subversive activities". These strikes lasted about half an hour. "One F-111 with its two crew members is missing". (Letter from President Reagan to Speaker O'Neill, April 16, 1986). It subsequently was learned that a number of Libyans (including civilians) had been killed.

Legislative leaders had been called to the White House. But there was no meaningful consultation. A letter to the President from Senators Pell, Byrd, Nunn and Leahy contained the following statement:

"...we would like to call your attention to the following factors: first, advance information as to the intentions of your Administration was the subject of continuous press attention for over a week prior to the military action, leading to reports of advance defensive action taken by Khaddafi which could have endangered American lives. Much of this was the result of substantial public commentary by Administration officials. Second, your special emissary, Ambassador Walters, apparently briefed our allies prior to the provision of information to responsible members of Congress. Third, the first indication of your decision was at a meeting Monday afternoon at the White House, after the operation was already underway, and this amounted to a notification of your actions rather than the consultation required by law -- Section 3 of the War Powers Act provides that the 'President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities....'

"We believe a strongly bipartisan foundation is the only guarantor of success in our nation's foreign affairs. It is in the spirit of further developing this foundation that we would suggest that together we refine the section on Consultation in the Act."*

President Reagan justified the strike on the following grounds:

"These strikes were conducted in the exercise of our right of self-defense under Article 51 of the United Nations Charter. This necessary and appropriate action was a preemptive strike, directed against the Libyan terrorist infrastructure and designed to deter acts of terrorism by Libya, such as the Libyan-ordered bombing of a discotheque in West Berlin on April 5....This was the latest in a long series of terrorist attacks against United States installations, diplomats and citizens carried out or attempted with the support and direction of Muammar Qadhafi."**

Article 51 of the United Nations Charter provides:

*Cong. Rec. - Senate, May 8, 1986, p. 5597

**Letter of April 16, 1986, supra.

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations". Germany, the Member of the United Nations in whose territory the armed attack against the discotheque occurred, did not take any action in the matter, and objected to the action taken by us. An attack against American citizens outside of our own borders may constitute a justifiable casus belli, but it is not an armed attack which justifies a counter attack under the plea of self-defense as contemplated by the Charter.

These air strikes were not prompt counter-attacks, which is the usual concept of self-defense. Congress declared war against Japan one day after Pearl Harbor (Hirabayashi v. United States, 320 U.S. 81, 85 (1943). President Lincoln issued a proclamation calling out the militia on April 15, 1861, three days after the bombardment of Fort Sumter (Prize Cases, supra, 17 L.Ed., at 469), at a time when communications were not as instantaneous as they are to-day.

The only justifications for the air strikes were (a) as an act of reprisal for the killing and wounding of United States military personnel in the discotheque, --

what Chairman Fascell described as "a delayed hot pursuit", -- nine days later; and (b) as a preemptive strike, designed to deter anticipated acts of terrorism carried out or attempted with Libyan support and direction.

These arguments might have won the approval of the legislative representatives if they had been discussed at a full dress consultation of the type envisaged in the House Committee report (p. 3, supra). In fact, some of those present have since expressed their approval.

The issue is not whether the strikes were justified, but whether there was adequate compliance with the War Powers Resolution. There was no question here about the President's deliberated decision to introduce United States Armed Forces into hostilities. And there was certainly sufficient time available for full consultation before taking that step.

THE CONSTITUTIONAL ISSUE

A. THE PRIZE CASES

"By the Constitution, Congress alone has the power to declare a national or foreign war. ...The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States. ...He has no power to initiate or declare a war either against a foreign nation or a domestic State." (emphasis added)

* * *

"If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate a war, but is bound to accept the challenge without waiting for any special legislative authority." (Prize Cases, 67 U.S. (2 Black) 635,668 (1863)

Accordingly, President Lincoln was justified in promptly responding with the use of force to the attack on Fort Sumter without approval of Congress, which was not then in session, but which subsequently ratified his acts.*

* After being convened in extraordinary session, Congress passed an act "approving, legalizing, and making valid all the acts, proclamations and orders of the President, &c. as if they had been issued and done under the previous express authority and direction of the Congress of the United States." (p. 670) (emphasis in original)

Since "Congress alone has the power to declare... foreign war," it alone must decide whether United States Armed Forces should be introduced into hostilities. How those forces are to function after they have been constitutionally introduced into hostilities is to be determined by the President within the limits prescribed by Congress, by virtue of his constitutional function as Commander-in-Chief, and his constitutional duty to "take Care that the Laws be faithfully executed." "The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by the Congress for the conduct of war and for the government and regulation of the Armed Forces." (Ex parte Quirin, 317 U.S. 1,26 (1942) (emphasis added.)

The clause granting to Congress alone the power to "declare War" is not couched in words of art, so as to limit that power to formally declared wars. "War has been well defined to be, 'That state in which a nation prosecutes its right by force.'" (67 U.S., supra, at 666); "Of the various wars or warlike incidents in which the United States have been involved only five have been formally declared by Congress" (Colada: "Naval Exercises in the Gulf of Sidra and the War Powers Resolution", p. 3).

Therefore the exclusive right in Congress "to declare war" includes its exclusive right to control the situations where the nation prosecutes its right by introducing its armed forces into "a qualified state of hostility," even in the absence of a formal declaration of war. That was the interpretation placed on the war clause by the Supreme Court during the administration of President John Adams, when the memory of the debates in connection with adoption and ratification was fresh in the minds of the justices.

During the Napoleonic wars, the United States became embroiled in a bitter quarrel with the French over their seizure of American ships. No declaration of war was enacted but numerous statutes were passed in regard to hostilities. The Supreme Court said:

> "The United States and the French republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorized by the constitutional authority of our country. It is war quoad hoc. As far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations. It is a maritime war, a war at sea as to certain purposes. ...It is therefore a public war between the two nations qualified on our part, in the manner prescribed by the constitutional organ of our country." (emphasis added.) Bas v. Tingy, 4 U.S. (4 Dall) 37, 45-46 (1800), opinion by Paterson, J., one of the Founders).

Shortly thereafter, Chief Justice Marshall said,

speaking for a unanimous Court in a similar case:

> "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry... Congress may authorize general hostilities... or partial hostilities..." (emphasis added). (Talbot v. Seaman, 5 U.S. (1 Cranch) 1, 28 (1801).

B. LITTLE V. BARREME

Little v. Barreme involved a statute passed during the above-described "qualified state of hostilities" between the United States and France. In citing it with approval, the Supreme Court said:

> Little v. Barreme, 2 Cranch 170 (1804), held the commander of an American warship liable in damages for the seizure of a Danish cargo ship on the high seas. Congress had directed the President to intercept any vessels reasonably suspected of being en route to a French port, but the President had authorized the seizure of suspected vessels whether going to or from French ports, and the Danish vessel seized was en route from a forbidden destination. The Court, speaking through Mr. Chief Justice Marshall, held that the President's instructions could not 'change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass." Id., at 179. Although there was probable cause to believe that the ship was engaged in traffic with the French, the seizure at issue was not among that class of seizures that the Executive had been authorized by statute to effect." (emphasis in original) (Butz v. Economou, 438 U.S. 478, 490 (1978 FJ).

Justice Clark, concurring in the judgment enjoining President Truman's seizure of the steel mills, said:

> "One of this Court's first pronouncements upon the powers of the President under the Constitution

was made by Mr. Chief Justice John Marshall some one hundred and fifty years ago. In Little v. Barreme, (2 Cranch 170 (1804)) he used this characteristically clear language in discussing the power of the President to instruct the seizure of the Flying Fish, a vessel bound from a French port... 'But when it is observed that (an act of Congress) gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any not bound to a French Port.' (Id., at 177-178 (emphasis changed)). Accordingly, a unanimous Court held that the President's instructions had been issued without authority and that they could not 'legalize an act which without those instructions would have been a plain trespass.' I know of no subsequent holding of this Court to the contrary." (Footnote 3 omitted). (343 U.S. at 660-661).*

C. THE STEEL SEIZURE CASE

In 1951, when most of the Nation's steel mills were threatened by a nation-wide strike, President Truman directed the Secretary of Commerce to seize and operate them, but to return them to their owners when effective future operation could be assured. In the interim, the managements were to continue all of their functions, and all of their existing rights and obligations would remain in full force and effect, including payment of dividends and all obligations. (Youngstown Co. v. Sawyer, 343 U.S. 579, 591-592 (1952).

The President's findings, which were not controverted, (pp. 678-679, dissenting opinion), declared that

*Footnote on p. 27a

*The four justices who constituted the court in that case had all participated in the state ratifying conventions. Chief Justice Marshall and Justice Washington participated in the Virginia Convention; Justice Cushing participated in the Massachusetts Convention; and Justice Chase participated in the Maryland Convention. Goebel: History of the Supreme Court of the United States, Vol. 1 (1971), pp. 344-345, 365-366, 377; Haskins: Ibid., Vol. 2 (1981), p. 97

"a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors and airmen" "now engaged in deadly combat with the forces of aggression in Korea, and... (who) are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression."(pp. 590-591).

"In his Message to Congress immediately following the seizure, the President explained the necessity of his action in executing the military procurement and anti-inflation legislative programs and expressed his desire to cooperate with any legislative proposals approving, regulating or rejecting the seizure of the steel mills. Consequently, there is no evidence whatever of any Presidential purpose to defy Congress or act in any way inconsistent with the legislative will." (emphasis added.) (p. 703, dissenting opinion)

The Court enjoined the seizure, saying:

> "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand." (p. 589).

1. THE POWERS OF THE COMMANDER-IN-CHIEF

The contention based on the powers of the Commander in Chief, -- the fundamental of the claim for unrestricted presidential power, -- was fully answered by Justice Jackson. He said:

> "The clause on which the Government next relies is that 'The President shall be Commander in Chief of the Army and Navy of the United States....' ...It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.
>
> * * *
>
> "I cannot foresee all that it might entail if the Court should indorse this argument. Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture." (emphasis added). (footnotes omitted.) (pp. 641-642.)

This opinion accurately expresses the intention of the Founders. In 1793, Madison wrote:

> "Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the

> power of judging of the causes of war, is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite or proper." (emphasis in original.) (VI. Writings of James Madison, 174 (G. Hunt ed. 1906)).

As President, Madison sent a message to Congress on June 1, 1812, in which, after recounting the depredations of British ships on American commerce on the Atlantic, he referred the matter to Congress in these words:

> "Whether the United States shall continue passive under these progressive usurpations and these accumulating wrongs, or opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty disposer of events, avoiding all connections which might entangle it in the contests or views of other powers, and preserving a constant readiness to concur in an honorable reestablishment of peace and friendship, is a solemn question which the Constitution wisely confides to the legislative department of the Government." (emphasis added.) (Sen. Rep. No. 220, pp. 11-12).

Jefferson, though not a Founder, was certainly familiar with their thinking. His message to Congress in December, 1801 is the model of appropriate presidential conduct:

> "Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean...with orders to protect our commerce against the threatened

> attack....Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril.... One of the Tripolitan cruisers having fallen in with and engaged the small schooner Enterprise....was captured, after a heavy slaughter of her men.... Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight." (343 U.S. Supra, at 642, n. 10). (emphasis added).

Hamilton, probably the strongest protagonist of executive power, wrote in The Federalist:

> "(T)he President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies; all which, by the Constitution under consideration, would appertain to the Legislature." (emphasis in original.) (The Federalist, No. 69, J. Cooke, Ed. 1961).

James Wilson was one of the leading members of the Philadelphia convention, and subsequently served as a Justice of the Supreme Court. In urging ratification in the Pennsylvania convention, he said:

> "This system will not hurry us into war; It is calculated to guard against it. It will not be in the power of a single man, or a single

> body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war." (2 Elliott Debates, 528.)

James Iredell was a delegate to the North Carolina convention, and also served subsequently as a Justice of the Supreme Court. In his speech in the Convention urging ratification, he said:

> "The King of Great Britain is not only the commander-in-chief of the land and naval forces, but has power, in time of war, to raise fleets and armies. He has also authority to declare war. The President has not the power of declaring war by his own authority, nor that of raising fleets or armies. These powers are vested in other hands. The power of declaring war is expressly given to Congress..." (4 Elliott Debates, 107-108.)

William Paterson was one of the Founders, and subsequently served as a Justice of the Supreme Court. While sitting as a Circuit Justice, he presided over a criminal trial. The defendant was charged with helping outfit a military expedition against a foreign nation with which the United States was at peace. As one defense, he sought to take the deposition of Secretary of State Madison and other cabinet members, which he claimed would prove that the President had consented to the military venture against Spanish holdings in South America.

Justice Paterson denied the motion to take the

depositions, upon the ground that they were completely irrelevant. He held that the Constitution, "which measures out the powers and defines the duties of the President, does not vest in him any authority to set on foot a military expedition against a nation with which the United States are at peace." (United States v. Smith, 27 Fed. Cas. 1192, 1229-1230 (1806)) He continued:

> "Does he possess the power of making war? That power is exclusively vested in Congress.... (T)he executive magistrate....and commander-in-chief of the forces by sea and land (may).... repel an invading foe. But to repel agressions and invasions is one thing, and to commit them against a friendly power is another....There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war." (emphasis added.) (pp. 1230-1231).

Protagonists of presidential power have made much of the fact that the original proposal in the Convention was to give Congress the power "to make war", but Madison and Gerry moved to insert 'declare', striking out 'make war' (emphasis in original). But the purpose of this change was "leaving to the Executive the power to repel sudden attacks". Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war" (2 Farrand: Records of the Federal Convention, 318). Justice Paterson held in the above-cited case that "the power of making war...is exclusively vested in Congress" (emphasis added).

"Although Congress and the Executive have been at odds for decades over the consitutionality of the legislative veto, the Supreme Court has never ruled on the issue" until its recent decision.* Therefore the Court attached great significance to the expressions by the Framers regarding the constitutional issues involved. (INS v. Chadha, 462 U.S. 919, 946-951, 958-959 (1983); see, to the same effect, Powell v. McCormack, 395 U.S. 486, 532-541 (1969)).

2. THE EXECUTIVE POWER; AND THE DUTY TO EXECUTE THE LAWS

The Court said:

> "Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the Presidant. In the framework of our Constituion, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States...' After granting many powers to the Congress, Article I goes on to provide that Congress may 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by

*Consumer Energy Council of America v. Federal Emergency Regularatory Commission, 673 F2d 425, 449 (D.C.Cir. 1982), cert. den. 77 L.Ed. 2d 1413 (1983)).

this Constitution in the Government of the United Stares, or in any Department or Officer thereof.'" (343 U.S. at 587-588)

Justice Jackson's concurring opinion said:

"The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law."

* * *

"The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies....(T)hey made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers." (emphasis added, footnotes omitted.) (pp. 646, 649-651).

3. THE EXERCISE OF PRESIDENTIAL AUTHORITY FOR ALMOST 200 YEARS

President Nixon's veto message contended that H.J. Res. 542 "would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years" (Appx. A, p. i). In the Steel Seizure case, the Court rejected the argument that executive power not otherwise authorized could be acquired by legislative acquiescence. The Court said:

> "It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or any Department or Officer thereof.'" (343 U.S. at 588-589).

"That an unconstitutional action has been taken before does not make that same action any less unconstitutional at a later date (Powell v. McCormack, 395 U.S. 486, 546-547 (1960). In the converse situation, the Supreme Court held that acquiescence by one branch does not transfer power to the other branch.

Justice White's dissent in the Legislative Veto case listed numerous instances over the years where the Executive acquiesced in the legislative veto, and even proposed statutes containing such a provision. (Chadha, supra, 462 U.S., at 968-974).

Yet seven members of the Court found the legislative veto unconstitutional.

In any event, the contention, that the power to introduce armed forces into hostilities or imminently hostile situations has vested in the Executive as the result of congressional acquiescence, is invalidated by the fact that Congress has reclaimed its exclusive power to make war by enactment of the War Powers Resolution, and the congressional declaration of purpose and policy in Sec. 2a. As Justice Clark said in his concurring opinion in the Steel Seizure case:

> "I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because here, as in Little v. Barreme, Congress had prescribed methods to be followed by the President in meeting the emergency at hand." (343 U.S. at 662)

As Justice Jackson said in his concurring opinion:

> "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." (343 U.S. at 637-638) (footnote omitted)

D. THE LEGISLATIVE VETO CASE

In the Legislative Veto case, INS v. Chadha, 462 U.S. 919 (1983), the Court held unconstitutional the provision in the Immigration and Naturalization Act authorizing Congress "by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States." (p. 923). "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked *** in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." (pp. 955,958).*

But in order to exercise the Constitutional power entrusted to Congress alone as to whether or not armed forces should be introduced into hostilities or imminently hostile situations, Congress need not take any legislative action at all. The President never had power to take such action in the absence of congressional authority. And Congress had never delegated that power to him.

The power remained with Congress and could be effectuated only by its affirmative authorization. The President may not frustrate the constitutional scheme by initiating an unauthorized introduction of armed forces, and keeping them in such hostilities

*Footnotes omitted.

or imminently hostile situations for more than sixty days, without obtaining a declaration of war, or other specific statutory authorization from Congress.

Kenneth Dam, Deputy Secretary, Department of State, testified before this Committee that Sec. 5b "does not fall within the scope of Chadha. Its constitutionality is neither affirmed, denied, nor even considered in the Chadha decision". (Hearings Concerning the Legislative Veto, July 19, 1983, p.82).

A related argument is expressed in President Nixon's veto message. He objects to the fact that under Sec. 5b "(n)o overt Congressional action would be required to cut off these powers (as Commander in Chief of the Armed Forces) -- they would disappear automatically unless the Congress extended them" (Appx. A, p. iii).

The Constitution requires an affirmative vote of both houses in order to make war, whether declared or undeclared. President Nixon's argument turns this constitutional requirement on its head. It would mean that a war which is initiated by the President unilaterrally could not be unmade except by the affirmative vote of both houses, - thus giving the President and a single house the power to take us into war.

E. OUR TREATY OBLIGATIONS

Sec. 8a of the Resolution provides:

> "Authority to introduce United States Armed Forces into hostilities or into (imminently hostile situations) shall not be inferred***
> "(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing (such introduction) and stating that it is intended to constitute specific statutory authorization within the meaning of this chapter".

President Nixon's veto message said: "Not the least of the adverse consequences of this resolution would be the prohibition contained in Section 8 against fulfilling our obligations under the NATO treaty as ratified by the Senate." (Appx. A, p. iii). The State Department justified the introduction of armed forces into Vietnam as carrying out our "commitments" under the SEATO treaty. (75 Yale L.J. 1085, 1094-1096, 1101-1102 (1966).

This does not rise to the dignity of a constitutional challenge, and surely is not tendered as such. These treaties contain, as they must, a reservation that each party will act "in accordance with its constitutional processes." (Sen. Rep. No. 220, p. 25).

The Senate Committee Report says:

> "There are two principal reasons for including these provisions with respect to our collective and bilateral security treaties. First, is to ensure that both Houses of Congress must be affirmatively involved in any decision of the United States to

engage in hostilities pursuant to a treaty. Treaties are ratified by and with the consent of the Senate. But the war powers of Congress in article I, section 8 of the Constitution are vested in both Houses of Congress and not in the Senate (and President) alone. A decision to make war must be a national decision. Consequently, to be truly a national decision, and, most importantly, to be consonant with the Constitution, it must be a decision involving the President and both Houses of Congress.

Second, the provisions with respect to treaties are important so as to remove the possibility of future contention such as arose with respect to the SEATO Treaty and the Vietnam war.

Treaties are not self-executing...Thus, by requiring statutory action, in the form of implementing legislation or an area resolution of the familiar type, the War Powers Act would perform the important function of defining that elusive and controversial phrase -- 'constitutional processes' -- which is contained in our security treaties." (Sen. Rep. No. 220, p. 26). (emphasis added).

The House Committee report said:

"This statement is aimed at rejecting those interpretations of the treaty obligations of the United States which hold that mutual security treaties such as NATO, SEATO, and ANZUS are 'self-executing' and do not require congressional sanction of any kind for Presidential actions taken in pursuit of such obligations, including actions which involve the deployment of U.S. Armed Forces into hostilities." (WPR at 29).

F. FOREIGN RELATIONS

President Reagan's Reports to the Congress stated that the three deployments in Lebanon are "being undertaken pursuant to the President's constitutional authority with

respect to the conduct of foreign relations and as Commander in Chief of the United States Armed Forces (WPR, at 61, 63, 65).

The President's authority with respect to foreign relations is not expressly granted by the Constitution. The Supreme Court said: "The investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.*** In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation" (U.S. v. Curtiss-Wright Corp., 299 U.S. 304, 318-319 (1936).

Therefore, the President alone may recognize and derecognize foreign governments (United States v. Belmont, 301 U.S. 324, 330 (1937); Goldwater v. Carter, 617 F. 2d. 697, 707-708 (D.C. Cir., en banc, (1979)*; may dispose of claims of American citizens against foreign governments (United States v. Pink, 315 U.S. 203, 229-230 (1942); Dames & Moore v. Regan, 453 U.S. 654, 679-680 (1981). These matters involve diplomatic relations, property rights, and commercial intercourse.

*Judgment vacated and case remanded with instructions to dismiss complaint. 444 U.S. 996 (1979).

But when human lives are at stake, the armed forces may not be used as the tail to the kite of the President's foreign policy. As was stated in the Convention, "Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war" (p. 33, supra).

This is emphasized by the fact that the foregoing implied exclusive power of the President over foreign relations does not apply when it collides with a power expressly conferred on the Congress, like the power to make war. The Supreme Court described it as "a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution" (Curtiss-Wright, supra, 299 U.S., at 320, emphasis added). It was held that President Carter had the power to terminate the treaty with Taiwan without the consent of the Senate only because "the Constitution specifically confers no power of treaty termination on either the Congress or the Executive" (617 F. 2d., supra, at 704). But when the President proposes to commit American lives in support of his foreign policy, he must first obtain the approval of Congress. To repeat the language of Justice Jackson (p. 27, supra):

> "But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign

affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture".

G. THE NECESSARY AND PROPER CLAUSE

Sec. 2(b) of the War Powers Resolution says:

"Under article 1, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof".

"By the settled construction and the only reasonable interpretation of this clause, the words 'necessary and proper' are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it" (Legal Tender Case, 110 U.S. 420, 440 (1884).

The War Powers Resolution is an "appropriate means which (is) conducive or adapted to the end to be accomplished", i.e., to carry into execution the exclusive powers granted to Congress by article 1, section 8; not only "To declare War" (cl. 11); but also: to "provide for the common Defense and general Welfare of the United States (cl. 1); "To raise and support Armies" (cl. 12); "To provide and maintain a Navy" (cl. 13); "To make Rules for the Government and Regulation of

the land and naval Forces" (cl. 14); and "To provide for calling forth the Militia to repel Invasion" (cl. 15).

CONCLUSION

In his statement calling for the subcommittee's hearing, Chairman Fascell said:

> "While the American people demand of their representatives that the President have the means and operational flexibility to respond with force if necessary to state-sponsored terrorism, they also demand that the Congress ensure that involvement in conflict is justified.
>
> "Thus, the American people demand, and indeed the Constitution requires, that the decision to enter and to remain in conflict must be a collective judgment by the President and the Congress. Fortunately, in the War Powers Resolution, we have an existing legal framework for that collective judgment."

The constitutionality of the War Powers Resolution is conclusively established by the decisions of the Supreme Court in Little v. Barreme; in the Prize Cases; and in the Steel Seizure Case; and by the unequovocal statements of all of the Founders who expressed their views on the subject.

Except "in extreme circumstances, such as a nuclear missile attack or direct invasion" (see Committee Reports, quoted at p. 2, supra), the President does not have the power, without congressional approval, to introduce United States Armed Forces into hostilities or into imminently hostile

situations. This power does not inhere in his function as Commander in Chief; nor in his control over foreign relations; nor in his responsibilities in regard to treaties; nor in any residual executive power. Neither has he acquired the power because it has been exercised for more than 200 years.

Unless the President obtains a binding adjudication that he has the asserted power, his duty to "take care that the Laws be faithfully executed" requires that he give scrupulous adherence to the mandate of Section 3. "Consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated" (House Committee Report, p. 3, supra). Congress has validly enacted this requirement pursuant to its power under the "necessary and proper" clause. "The Congress, as well as the President, is trustee of the national welfare" (Douglas, concurring in the Steel Seizure Case, 343 U.S., at 629).

It is recognized that effective consultation cannot be conducted with 535 members of Congress. Therefore it is incumbent on Congress to work out some arrangement like S.J. Res. 340, or some other appropriate measure, to provide a realistic means for exercising its prerogative of consultation. As was said by Justice Jackson in his concurring opinion in the Steel Seizure Case:

> "But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that 'The tools belong to the man who can use them.' We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.
>
> "The essence of our free Government is 'leave to live by no man's leave, underneath the law' -- to be governed by those impersonal forces which we call law... With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."*

If Congress adopts this procedure, it is hoped that President Reagan will welcome this "commitment to bipartisanship in U.S. foreign policy" with the same enthusiasm as he welcomed the Multinational Force in Lebanon Resolution (p. 15, <u>supra</u>).

*343 U.S. at 654-655

APPENDIX A

The President's Message to the House of Representatives Returning H.J. Res. 542 Without His Approval. October 24, 1973

To the House of Representatives:

I hereby return without my approval House Joint Resolution 542--the War Powers Resolution. While I am in accord with the desire of Congress to assert its proper role in the conduct of our foreign affairs, the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the best interests of our Nation.

The proper roles of the Congress and the Executive in the conduct of foreign affairs have been debated since the founding of our country. Only recently, however, has there been a serious challenge to the wisdom of the Founding Fathers in choosing not to draw a precise and detailed line of demarcation between the foreign policy powers of the two branches.

The Founding Fathers understood the impossibility of foreseeing every contingency that might arise in this complex area. They acknowledged the need for flexibility in responding to changing circumstances. They recognized that foreign policy decisions must be made through close cooperation between the two branches and not through rigidly codified procedures.

These principles remain as valid today as they were when our Constitution was written. Yet House Joint Resolution 542 would violate those principles by defining the President's powers in ways which would strictly limit his constitutional authority.

Clearly Unconstitutional

House Joint Resolution 542 would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years. One of its provisions would automatically cut off certain authorities after sixty days unless the Congress extended them. Another would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution--an action which does not normally have the force

of law, since it denies the President his constitutional role in approving legislation.

I believe that both these provisions are unconstitutional. The only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution--and any attempt to make such alterations by legislation alone is clearly without force.

Undermining Our Foreign Policy

While I firmly believe that a veto of House Joint Resolution 542 is warranted solely on constitutional grounds, I am also deeply disturbed by the practical consequences of this resolution. For it would seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis. As a result, the confidence of our allies in our ability to assist them could be diminished and the respect of our adversaries for our deterrent posture could decline. A permanent and substantial element of unpredictability would be injected into the world's assessment of American behavior, further increasing the likelihood of miscalculation and war.

If this resolution had been in operation, America's effective response to a variety of challenges in recent years would have been vastly complicated or even made impossible. We may well have been unable to respond in the way we did during the Berlin crisis of 1961, the Cuban missile crisis of 1962, the Congo rescue operation in 1964, and the Jordanian crisis of 1970--to mention just a few examples. In addition, our recent actions to bring about a peaceful settlement of the hostilities in the Middle East would have been seriously impaired if this resolution had been in force.

While all the specific consequences of House Joint Resolution 542 cannot yet be predicted, it is clear that it would undercut the ability of the United States to act as an effective influence for peace. For example, the provision automatically cutting off certain authorities after 60 days unless they are extended by the Congress could work to prolong or intensify a crisis. Until the Congress suspended the deadline, there would be at least a chance of United States withdrawal and an adversary would be tempted therefore to postpone serious negotiations until the 60 days were up. Only after the Congress acted would there be a strong incentive for an adversary to negotiate. In addition,

the very existence of a deadline could lead to an excalation of hostilities in order to achieve certain objectives before the 60 days expired.

The measure would jeopardize our role as a force for peace in other ways as well. It would, for example, strike from the President's hand a wide range of important peacekeeping tools by eliminating his ability to exercise quiet diplomacy backed by subtle shifts in our military deployments. It would also cast into doubt authorities which Presidents have used to undertake certain humanitarian relief missions in conflict areas, to protect fishing boats from seizure, to deal with ship or aircraft hijackings, and to respond to threats of attack. Not the least of the adverse consequences of this resolution would be the prohibition contained in section 8 against fulfilling our obligations under the NATO treaty as ratified by the Senate. Finally, since the bill is somewhat vague as to when the 60 day rule would apply, it could lead to extreme confusion and dangerous disagreements concerning the prerogatives of the two branches, seriously damaging our ability to respond to international crises.

Failure to Require Positive Congressional Action

I am particularly disturbed by the fact that certain of the President's constitutional powers as Commander in Chief of the Armed Forces would terminate automatically under this resolution 60 days after they were invoked. No overt Congressional action would be required to cut off these powers--they would disappear automatically unless the Congress extended them. In effect, the Congress is here attempting to increase its policy-making role through a provision which requires it to take absolutely no action at all.

In my view, the proper way for the Congress to make known its will on such foreign policy questions is through a positive action, with full debate on the merits of the issue and with each member taking the responsibility of casting a yes or no vote after considering those merits. The authorization and appropriations process represents one of the ways in which such influence can be exercised. I do not, however, believe that the Congress can responsibly contribute its considered, collective judgment on such grave questions without full debate and without a yes or no vote. Yet this is precisely what the joint resolution would allow. It would give every future Congress the ability to handcuff every future President merely by doing nothing and sitting

still. In my view, one cannot become a responsible partner unless one is prepared to take responsible action.

Strengthening Cooperation Between the Congress and the Executive Branches

The responsible and effective exercise of the war powers requires the fullest cooperation between the Congress and the Executive and the prudent fulfillment by each branch of its constitutional responsibilities. House Joint Resolution 542 includes certain constructive measures which would foster this process by enhancing the flow of information from the executive branch to the Congress. Section 3, for example, calls for consultations with the Congress before and during the involvement of the United States forces in hostilities abroad. This provision is consistent with the desire of this Administration for regularized consultations with the Congress in an even wider range of circumstances.

I believe that full and cooperative participation in foreign policy matters by both the executive and the legislative branches could be enhanced by a careful and dispassionate study of their constitutional roles. Helpful proposals for such a study have already been made in the Congress. I would welcome the establishment of a nonpartisan commission on the constitutional roles of the Congress and the President in the conduct of foreign affairs. This commission could make a thorough review of the principal constitutional issues in Executive-Congressional relations, including the war powers, the international agreement powers, and the question of Executive privilege, and then submit its recommendations to the President and the Congress. The members of such a commission could be drawn from both parties--and could represent many perspectives including those of the Congress, the executive branch, the legal profession, and the academic community.

This Administration is dedicated to strengthening cooperation between the Congress and the President in the conduct of foreign affairs and to preserving the constitutional prerogatives of both branches of our Government. I know that the Congress shares that goal. A commission on the constitutional roles of the Congress and the President would provide a useful opportunity for both branches to work together toward that common objective.

RICHARD NIXON

The White House,
October 24, 1973.

9. WEEKLY COMP. PRES. DOC. 1285.

APPENDIX 19

Statement Submitted by the Coalition for a New Foreign and Military Policy

The Coalition for a New Foreign and Military Policy condemns all acts of terror, regardless of the provocation. We consider the recent U.S. attacks against Libya to be aggressive and futile exercises of military power as well as acts of terror which killed innocent bystanders.

Any use of U.S. military force to kill foreign citizens on their own soil will be seen by much of the world as an act of military aggression. Regardless of the provocation, any such use of military force is extremely dangerous to the security of the United States and to the political stability of the region in which the action takes place. Such unilateral military action also undermines efforts to expand the still embryonic restraints of international law and morality.

The Reagan Administration's use of military force in the "war against terrorism" has much in common with events in the Gulf of Tonkin two decades earlier. Both actions began with U.S. warships engaging in provocative maneuvers close to an adversary's shores, and far from our own shores. Both actions pitted the United States against a small Third-World nation armed with Soviet weapons. In neither case was the United States acting as part of a multi-national peace-keeping force, or even with the support of its own major allies. Both actions were immediately popular with the Congress and the American people. Neither action was intended to be the beginning of a long, bloody, and unsuccessful war.

Acts of terrorism should be thwarted whenever possible by defensive security measures, but they will not stop as long as desperate people have deep grievances.

We are grateful for the courageous stand of those few members of Congress and leaders of European governments who immediately recognized the folly of the April 14 attacks on Tripoli and Benghazi and made their opposition known. We strongly oppose any measure before the Congress which would use the temporary popularity of the attacks on Libya to further dilute the constitutional responsibility of the Congress to participate in decisions about sending U.S. military forces into combat abroad.

(This statement was made public by the Coalition Executive Committee and submitted to the House Foreign Affairs Committee on April 28, 1986.)

The following organizations are members of the Coalition: American Baptist Churches USA, National Ministries • American Committee on Africa • American Ethical Union • American Friends Service Committee • American-Areb Anti-Discrimination Committee • Americans for Democratic Action • Center for International Policy • Center of Concern • Church of the Brethren, Washington Office • Christian Church (Disciples of Christ) Department of Church and Society • Church Women United • Clergy and Laity Concerned • Council on Hemispheric Affairs • Democratic Socialists of America • Episcopal Peace Fellowship • Fellowship of Reconciliation • Friends Committee on National Legislation • Friends of the Earth • Friends of the Filipino People • Institute for Food and Development Policy • Jubilee, Inc./The Other Side • Mennonite Central Committee U.S. Peace Section • Middle East Peace Project • Movement for a Free Philippines • National Assembly of Religious Women • National Association of Social Workers • National Council of Churches • National Federation of Priests' Councils, USA • National Gray Panthers • National Office of Jesuit Social Ministries • NETWORK • New Jewish Agenda • North American Federation of Temple Youth • OXFAM America • Presbyterian Church (USA), Washington Office • Quixote Center • SANE • Sisters of St. Joseph of Peace • Union of American Hebrew Congregations • Unitarian Universalist Association • Unitarian Universalist Service Committee • United Church of Christ, Board for Homeland Ministries • United Church of Christ, Office of Church in Society • United Methodist Church, Board of Church and Society • United Methodist Church, Board of Global Ministries, Women's Division • United States Student Association • War Resisters League • Washington Office of the Episcopal Church • Washington Office on Africa • Washington Office on Latin America • Women's International League for Peace and Freedom • Women Strike for Peace • World Federalist Association • World Peacemakers • Young Women's Christian Association of the USA

BOSTON PUBLIC LIBRARY
3 9999 01701 851 4

Boston Public Library

KF27
.F636
1986X

87601389-01

The Date Due Card in the pocket indicates the date on or before which this book should be returned to the Library.

Please do not remove cards from this pocket.

BOSTON PUBLIC LIBRARY

BOSTON PUBLIC LIBRARY